Supreme Court U.S.
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In The
Supreme Court of the United States

COREY THOMAS,

Petitioner,

v.

WAL-MART STORES, INC.,

Respondent.

ANTHONY A. MONTAGUE,

Petitioner,

v.

ASPLUNDH TREE EXPERT CO.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Eleventh Circuit has departed from the jurisprudence of this Court and that of the other circuits in race discrimination employment cases by requiring a closely similar comparator as the sole method for avoiding summary disposition?

2. Whether the Eleventh Circuit departed from this Court's direction by declining to allocate the burden of proof to the employer on the "same decision" defense?

PARTIES TO THE PROCEEDINGS BELOW

The Petitioners in this Court, Corey Thomas and Anthony A. Montague, are individuals who were plaintiffs in the District Court and who were appellants in the Court of Appeals.

The Respondents in this Court, Wal-Mart Stores, Inc., and Asplundh Tree Expert Co., are corporations which were defendants in the District Court and which were appellees in the Court of Appeals.

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OPINIONS BELOW

The two Court of Appeals opinions that the petitioners ask this Court to review are *Thomas v. Wal-Mart Stores, Inc.,* (unpublished) (11th Cir., October 30, 2003), and *Montague v. Asplundh Tree Expert Co.,* (unpublished) (11th Cir., October 1, 2003), which are reproduced in the Appendix.

In *Thomas,* the Report and Recommendation of the United States Magistrate recommending that Wal-Mart's Motion for Summary Judgment be granted also is reproduced in the Appendix. *Thomas v. Wal-Mart Stores, Inc.,* Case # CV-01-S-1326-NE (N.D.Ala., March 19, 2003). The District Judge's Order adopting the Report and Recommendation of the Magistrate Judge, entered on March 26, 2003, also is reproduced in the Appendix.

In *Montague,* the December 11, 2003, Order of the Eleventh Circuit denying the Petitions for Rehearing and for Rehearing En Banc is also reproduced in the Appendix. The District Judge's Memorandum Opinion also is reproduced in the Appendix. *Montague v. Asplundh Tree Expert Co.,* Case # CV-02-S-0530-NE (N.D.Ala., March 27, 2003). The District Judge's Order, entered on March 27, 2003, also is reproduced in the Appendix.

JURISDICTIONAL BASIS

This Petition asks the Court to review two judgments of the Court of Appeals for the Eleventh Circuit which involve closely related questions. A single Petition is filed pursuant to Rule 12, ¶ 4 of the Rules of the Supreme Court of the United States.

This Petition asks the Court to review the October 30, 2003, opinion and judgment of the United States Court of Appeals for the Eleventh Circuit in *Thomas,* and the October 1, 2003, opinion and judgment in *Montague.* The Court of Appeals affirmed the decisions of the District Court, which had granted Wal-Mart's and Asplundh's Motions for Summary Judgment. The Court of Appeals had appellate jurisdiction as set forth in 28 U.S.C. §1291.

In *Thomas*, the Eleventh Circuit issued its judgment as a mandate on November 28, 2003. In *Montague,* the Order denying the Petitions for Rehearing and for Rehearing En Banc was filed on December 11, 2003.

If the Court grants the Petition, it will have jurisdiction pursuant to 28 U.S.C. §1254(1).

STATUTES INVOLVED IN THE CASE

42 U.S.C. §1981: "(a) All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens . . . (b) For purposes of this section, the term 'make and enforce contracts' includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship."

42 U.S.C. §2000e-2(a)(1): "It shall be an unlawful employment practice for an employer – (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race. . . . "

42 U.S.C. §2000e-3(a): "It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter. . . ."

STATEMENT OF THE CASES

These two cases present compelling circumstantial evidence from which a jury might well reasonably conclude that the defendants engaged in race discrimination and race-based retaliation.

In both cases, the plaintiff is a black employee who was a supervisor whose performance was more than satisfactory throughout employment until the culminating incident. In both cases, all the relevant managers and decision makers are white persons. In both cases, the plaintiff engaged in protected behavior related to race discrimination by bringing racial issues at the workplace to the attention of managers, and by informing their supervisors of their intent to involve civil rights agencies to assert their rights. Shortly thereafter, both were fired without warning. Both plaintiffs contend that the employers had a prior agenda, looking for an excuse to be rid of them for race-related reasons. Both plaintiffs contend that the explanation provided by the employer was not the real reason for which they were fired.

In both cases the Eleventh Circuit held that the circumstantial evidence did not fit the rigid schematic pattern required to permit a jury trial, because the plaintiffs could not provide evidence of a closely similar comparator who was treated better in a closely similar

situation. In both cases the employer asserted the "mixed motive" defense, but the Eleventh Circuit declined to allocate the burden of proof to the employer under *Desert Palace, Inc. v. Costa,* ___ U.S. ___, 123 S.Ct. 2148 (2003).

Facts of *Thomas v. Wal-Mart.*

Corey Thomas worked for Wal-Mart from August 24, 1998, until June 30, 2000.[1] He was assigned to supervision of the all-night shift at the Guntersville store. He repeatedly requested a transfer off that shift and out of that store.[2] When he did so, he expressed bona fide reasons for his request which related to racial matters. In response to Thomas' requests, Wal-Mart solicited complaints against Thomas and fired him even though he was not guilty of misconduct.

The racial issues raised by Thomas included false accusations by managers that Thomas (who is married) was engaging in late night sex at the workplace with white subordinates. Kelly Townson states:

> 8. In approximately June, 2000, Mr. Leverette and a loss prevention supervisor named Mike Hill asked me about whether I was having an affair with Corey. Mr. Leverette asked the questions. He turned around everything I said to try to get me to admit to something, even

[1] Doc 32-Pg 1. Thomas and Montague respectfully provide the citations to the record which appeared in the briefs in the Court of Appeals, even though that record is not before the Court in this Petition. At the summary judgment stage, of course, the record is construed in a light favorable to the non-movants.

[2] Doc 27-Thomas deposition II, Pgs 72-74.

> though there was never any inappropriate contact between Corey and me. I was married at the time, and I am still married.
>
> 9. In approximately late June, 2000, I was questioned by Jay Parker, the District Manager, about Corey. I told Mr. Parker that in my opinion some of the employees had a problem with Corey solely because he is black. Mr. Parker was not interested in that. Instead, he repeatedly pressed me about the rumors that Corey and I were having an affair and engaging in sex at the Wal-Mart TLE (the auto center).
>
> 10. I quit the next morning after the questioning by Jay Parker because I considered all the suspicious questioning by managers to be offensive, unfair and inappropriate.[3]

The relegation of a black assistant manager to the all-night shift, and the false accusation of inter-racial sex was a repeat. Wal-Mart had falsely accused the prior all-night manager similarly. Mylinda Cooper provides evidence of a previous incident similar to the incident at issue in this case, as follows:

> 3. When I was last employed at the Guntersville store, Keith Becton was the Co-Manager and one of my supervisors.
>
> 4. When I was last employed at the Guntersville store, I was assigned to third shift. The third shift manager was Douglas Toney, who is a black person. I am white. Mr. Becton spread false rumors about me supposedly having an affair

[3] Doc 16-Townson declaration, ¶¶8-10.

with Mr. Toney. I was married at the time, and I am still married.

5. Mr. Becton falsely accused me of having an affair with Mr. Toney. He did so in the presence of two other employees.

6. I could not continue working at Wal-Mart after Mr. Becton falsely accused me of having an affair with Mr. Toney. I did not report for work again because of that incident.[4]

Thomas' performance was exemplary prior to the investigation which was the culminating event in his employment. Store Manager Larry Leverette evaluated Thomas, rating him as having met expectations in two areas, and having exceeded expectations in three areas.[5] Becton, Co-Manager, concurred that there were no issues regarding deficiencies in Thomas' performance.[6] District Manager Jay Parker, who eventually decided to fire Thomas,[7] testified, "In the time I had him under my supervision, I had no reason to complain about his work. He did a good job as far as I was concerned."[8]

Without spending time in all the areas of the store, Thomas was not eligible for promotion under Wal-Mart policy.[9] He first asked Leverette for a transfer to day shift

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[4] Doc 16-Cooper declaration, ¶¶3-6.

[5] Doc 32-Pgs 3,4.

[6] Doc 16-Becton deposition, Pgs17-18.

[7] Doc 27-Parker deposition, Pg 16.

[8] Doc 16-Parker deposition, Pg 65.

[9] Doc 27-Thomas deposition I, Pg 186, 197; Thomas deposition II, Pgs 44-45.

in November or December, 1999.[10] Leverette told Thomas that he was unable to fill the position with another assistant, even though none of the white assistant managers had been assigned to night shift in order to be eligible for promotion.[11] The following week, Leverette moved the other assistant managers to different departments, but did not change Thomas' assignment.[12]

In January of 2000, Thomas again asked Leverette for a transfer to another store or to be moved from the night shift.[13] Leverette refused, and told Thomas he didn't think Thomas would do well on the day shift and that he was "too direct" for the day shift.[14] In expressing his desire to transfer to another store, Thomas told Leverette that some subordinate employees had made racial comments about him, and referred to him as a "nigger."[15] Thomas informed Leverette about a specific incident in which a subordinate employee called him a "nigger." In a separate incident, another white employee, Mark Weeks, said that the system was backwards because the employee should be telling Thomas what to do.[16]

A couple of weeks later Leverette again refused, stating that Thomas could not force him to approve the

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[10] Doc 32-Pg 3.

[11] Doc 27-Thomas deposition I, Pg 134.

[12] Doc 27-Thomas deposition I, Pgs176-80.

[13] Doc 32-Pg 4.

[14] Doc 32-Pg 4; Doc 27-Thomas deposition II, Pgs13-14.

[15] Doc 32-Pgs 4,5.

[16] Doc 32-Pg 4 n.1; Doc 27-Thomas deposition II, Pgs 39-40.

change in shift.[17] Thomas' asked if he would have to file an EEOC Charge to make progress in his career.[18] During the same time frame, Leverette told Thomas and a woman employee who had recently graduated that the degree didn't mean much, but that Wal-Mart would always promote blacks and women.[19]

In late March or early April of 2000, the store conducted a "grass roots" meeting, in which employees were invited to discuss their concerns and problems.[20] This was not a typical "grass roots" meeting. Instead, it was a meeting devoted to bashing Thomas. Two third-shift employees who attended the meeting testified that the managers held it solely for that purpose – Tonya Daniel and Katrina Milligan. Ms. Daniel states:

> 7. There was a meeting held by Keith Becton and Larry Leverette during the third shift in approximately late March or early April of 2000. Instead of a ordinary grass roots meeting in which employees raised bona fide concerns, this particular meeting was solely devoted to bashing Corey. Mr. Becton and Mr. Leverette brought up Corey's name in a very negative way and encouraged any negative comments they could get. They didn't want to know anything favorable about Corey, only things which were negative.[21]

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[17] Doc 32-Pgs 4-5; Doc 27-Thomas deposition II, Pg 47.

[18] Doc 32-Pg 5; Doc 27-Thomas deposition II, Pgs 47-48.

[19] Doc 27-Thomas deposition I, Pgs193-94.

[20] Doc 32-Pg 6.

[21] Doc 17-Daniel declaration, ¶7; similarly, Doc 20-Milligan declaration ¶8.

On the day after the grass roots meeting, one of the employees Carrie Gosnell complained to Thomas about Dennis Bailey. Bailey was openly a racist who opposed Thomas' supervision. Four witnesses testified about Bailey's race bias – Tonya Daniel, Mylinda Cooper, Katrina Milligan and Kelly Townson. Two examples follow. Tonya Daniel states:

> 8. One of the most outspoken employees bashing Corey at the meeting was Dennis Bailey. Mr. Bailey complained at the meeting about Corey supposedly flirting with women employees and showing favoritism toward women employees. Mr. Bailey's complaints were not true. On more than ten occasions I have heard Mr. Bailey use the word "nigger" referring to Corey.[22]

Mylinda Cooper states:

> 8. One of the third shift employees was Dennis Bailey. On many occasions I have heard Mr. Bailey use the word "nigger." It was a common occurrence for Mr. Bailey and his friends on third shift to use that word.[23]

In the incident with Bailey on the day following the meeting, employee Carrie Gosnell, who had not attended the meeting, asked that Thomas tell Bailey to leave her alone.[24] Thomas directed his subordinate Bailey to stop bothering Ms. Gosnell.[25] He told Bailey as follows:

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[22] Doc 17-Daniel declaration, ¶8.

[23] Doc 16-Cooper declaration, ¶8.

[24] Doc 16-Thomas deposition II, Pgs 83-84.

[25] Doc 32-Pg 6.

> You guys had a chance to voice your concerns. You have had a chance to have your say. Let's leave it in the room last night and let's get to work. We don't have time to be playing. Carrie says you are bothering her trying to share what went on at the grass roots meeting with her. She's not interested. Please leave her alone.[26]

Thomas then walked away.[27] Ms. Gosnell then complained a second time, and reported that Bailey had "chastised" her for talking to Thomas.[28] This time Thomas spoke to Mr. Bailey as follows, "This is the second time, Dennis. Do not approach her again. Leave her alone. We have got too much work to do."[29]

Bailey responded that Thomas was retaliating against him.[30] Bailey threatened that Thomas would lose his job for sure, because (according to Bailey) Larry Leverette "told me I could call him if you retaliated against me from grass roots."[31] Bailey then called Leverette during the overnight shift, and told him that he wanted to call the police because he felt threatened by Thomas.[32] Leverette conferred with Bailey, but he declined to talk with Ms. Gosnell.[33]

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[26] Doc 16-Thomas deposition II, Pg 84.

[27] Doc 16-Thomas deposition II, Pg 84.

[28] Doc 16-Thomas deposition II, Pg 84.

[29] Doc 16-Thomas deposition II, Pg 84.

[30] Doc 16-Thomas deposition II, Pg 84.

[31] Doc 16-Thomas deposition II, Pgs 84-85, 87.

[32] Doc 16-Thomas deposition II, Pg 85; Doc 32-Pgs 6,7.

[33] Doc 16-Thomas deposition II, Pg 86.

Leverette was aware of Thomas' prior reports about his subordinates engaging in race-based defiance of his supervision.[34] Even so, Leverette accepted Bailey's version and began a so-called "investigation." Parker's investigation which eventually resulted in Thomas getting fired grew out of Leverette's investigation.[35]

On June 30, 2000, Parker fired Thomas. Parker informed Thomas he was being fired for sexual harassment and inappropriate conduct.[36] Parker said Townson had admitted that she met Thomas in the restroom area of the tire and lube center, where they would kiss and fondle each other.[37] This statement by Parker was completely false. In fact, Ms. Townson denies any inappropriate conduct and denies any such confession.[38] Parker also told Thomas he was fired for "seeking to retaliate" against Bailey for comments made at the grass roots meeting.[39] Parker did not specify the nature of the retaliation he alleged that Thomas was "seeking." No *tangible* retaliation of any kind occurred or was alleged by Bailey.

Parker testified that Thomas' violations amounted to gross misconduct, which was grounds for termination.[40] No one except Bailey had reported any complaint against Thomas. All the other alleged violations were brought to

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[34] Doc 32-Pgs 4,5; Doc 27-Thomas deposition II, Pgs 39-40.

[35] Doc 16-Parker deposition, Pgs 33-35.

[36] Doc 32-Pg 8.

[37] Doc 32-Pg 8; Doc 16-Thomas deposition II, Pgs 90-91.

[38] Doc 16-Townson declaration, ¶¶5, 9-10.

[39] Doc 32-Pg 8.

[40] Doc 32-Pg 8.

light only because of Parker's investigation, in response to Parker's requests for information from employees far below him in the chain of command.

Thomas admits one statement made to the front end manager Judy Staton which contained a sexual reference.[41] Staton did not complain about the conversation when it occurred.[42] She first brought it up in response to questions from Parker about a month later.[43] The sexual reference was, "Until you see me stick it in and pull it out, I'm not having an affair." Thomas' explanation was as follows:

> I asked Judy could I see her for a moment. We went into the manager's office. And I stated to her we need to control these rumors. . . . And I asked her to iterate to her cashiers that they need not spread rumors that affect people's lives and their careers. I have a family. And I have a career. I would appreciate it if they didn't do that. Her response was what do you mean. And I made it very clear, unless they see me stick it in and pull it out, I'm not involved in an affair. Just talking with somebody does not constitute an affair. Please reiterate that to your cashiers.
>
> I wanted her to address the importance or better yet address the detriment that a rumor can cause on someone's family and career. She and I held a one-on-one leader-to-leader meeting. And in giving her the most clearest description I

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[41] Doc 32-Pg 8, n.6.

[42] Doc 27-Parker deposition, Pgs19-20.

[43] *Id.*; Doc 27-Exhibit 13, Statement of Staton.

> could, I wanted her to relay to her cashiers how inappropriate and unprofessional and devastating it is to spread lies like that.[44]

Apart from admitting making the statement to Ms. Staton, Thomas disputes all of the incidents, contending that they were either totally false or willfully misinterpreted in a false light unfavorable to Thomas.[45] For example, Thomas denies any misconduct regarding sexual innuendos. On one occasion when Thomas saw a night-shift employee dressed up during the day time, he commented that she "cleans up really nice." The comment was made to another male employee, not to the female employee herself.[46] In another example, when Thomas finally was transferred off of night shift (a transfer which was ordered by Parker as an outcome of Bailey's complaint, not in response to Thomas' requests[47]), some of the night-shift employees presented him with a gift which had sexual content. It was a small artificial tree adorned with condoms, to mark his resumption of a more family-friendly schedule. Thomas expressed his concern that the gift was inappropriate, although he accepted it and took it home to his wife. Although he considered the gift to be inappropriate, he was not personally offended. Thomas made the judgment that he would not reprimand his former

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[44] Doc 16-Thomas deposition II, Pgs115-16; 111-12.

[45] Doc 16-Thomas deposition II, Pgs118-22, 124-28, 146-51.

[46] Doc 16-Thomas deposition II, Pgs108-16.

[47] The reason for the long-desired transfer was that Parker instructed Leverette to put Thomas on days was "so that he wouldn't still be supervising Dennis Bailey." (Doc 27-Parker deposition, Pg 39)

subordinates for their misguided generosity on their last night under his supervision.[48]

The evidence of pretext includes the testimony of disinterested third parties. They testify not only to Thomas's innocence of wrong-doing; they also observed and experienced race-bias in those who supervised and investigated Thomas. Katrina Milligan testifies as follows:

> 12. I observed that Mr. Becton and Mr. Leverette treated Corey differently from the way they treat Assistant Managers who are white persons. They were distant toward Corey and acted as if he were inferior. They communicated familiarly with the white Assistant Managers but not with Corey.[49]

Tonya Daniel testifies as follows:

> 9. In my opinion, based upon my observations, the only real problem was that a small number of white employees resented having a black manager over them, and Mr. Becton and Mr. Leverette were very sympathetic to those resentful white employees.[50]

Facts of *Montague v. Asplundh.*

Montague worked for Asplundh from 1991 until he was fired effective April 12, 2001.[51] He was a Coordinator, a

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[48] Doc 16-Thomas deposition II, Pgs120-22, 124-28, 147-51.

[49] Doc 20-Milligan Declaration, ¶12.

[50] Doc 17-Daniel Declaration, ¶9.

[51] Doc 57-Pgs 3,9.

supervisory position.[52] He reported to Troy Rice, the General Foreman.[53] His performance was Exceptional in two categories out of twenty (Dependability and Accident Prevention), and Very Good (defined as "consistently exceeds specifications") in all the other eighteen categories.[54]

Asplundh's proffered reason was insubordination. (Opinion, p.3) Asplundh contends that Montague was fired because of his participation in an argument with Rice. The argument arose after a meeting with employees of Huntsville Utilities. The three Asplundh employees at the meeting were Montague, Rice and Marty Rowell.[55] Rice objected to Montague's behavior at the meeting. Afterwards in the parking lot, Rice accused Montague of being critical of Rowell and disloyal to Asplundh at the meeting.[56] The company contends that its decision to fire Montague was made by Kerry Miller, Asplundh's Compliance and Equipment Supervisor.[57] The company contends that Miller's decision was based upon written statements from Rice and Rowell.[58]

Montague's contention is that his supervisor Rice wanted to be rid of him, and that the so-called "insubordination" was a false excuse. In addition to the evidence

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[52] Doc 57-Pgs 2-3.

[53] Doc 42-Montague Declaration, ¶3.

[54] Doc 39-Miller deposition, Exhibit 4.

[55] Doc 57-Pg 5.

[56] Doc 57-Pg 6; Doc 39-Montague deposition, pp.118-19.

[57] Doc 39-Rice deposition, p.56.

[58] Doc 39-Miller deposition, pp.30-32, 42.

which established the prima facie case, Montague submits that there are six material points from which a reasonable jury may well conclude that the company did not provide an honest explanation of its motivation:

– (i) Rice initiated and escalated the argument.

Rice admittedly initiated the confrontation in the parking lot. Montague and Rice differ about the details of the confrontation. For the purposes of the current appeal, the Court will credit the testimony of Montague, the non-movant, as follows:

> 14. Immediately after the meeting, Mr. Rice called me over to the side of his truck and started shouting and screaming at me. He yelled that he was pissed off. I was completely taken by surprise, because the meeting had concluded just fine, with everybody seeming to be in agreement that we had cleared the air.
>
> 15. I raised my voice in the parking lot, but not until Mr. Rice had been shouting at me for maybe two or three minutes. A couple of times during the first two or three minutes I tried to reply in a normal voice, but Mr. Rice didn't want to hear a word of it. He would interrupt and drown me out with continued shouting. After about two or three minutes of taking this, I finally shouted back at him in order to be heard.[59]

Montague testified as follows in his deposition about the continued altercation:

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[59] Doc 42-Montague Declaration, ¶¶14-15, typographical error corrected.

. . . I know I didn't cuss him. But he was yelling and kept hollering you need to quiet down, you work for Huntsville Utilities through contract. And I said, you need to quiet down too. I said, you can't just yell and scream at me you know. And then I told him, I said, that's all right, I'm going to get you for all this racism, you and the company, once and for all. He said, oh, you can go get the NAACP and get your lawyers or whatever you want, I don't care. And I said, well, you've got to take me home. . . . We yelled and screamed all the way to the house. He kept yelling and screaming at me. Well, at certain intervals he quieted down but I think when we first started he was still yelling about I don't care about you getting no lawyer, if the company wants to fire me over this, you know, they can have my job and they can do this and they can do that. And he kept on yelling and kept on bringing the NAACP up and all this and all that and he kept on yelling at me. I said you can't keep yelling at me, you need to stop, I'm the supervisor, I'm a man, and that's just the way it went all the way down the road. And then we got back, got down the road a good little piece and then he stopped after he seen I wasn't going to stop yelling and we both calmed down and then he started talking about . . . I am getting sick of this black and white issue up here, I'm getting sick of this racism issue, and all this and that. . . . When we got ready to pull out, to go home, from the Huntsville Utilities' property he looked over and asked me, he said, do you want to go home or do you want to go back

to work. I said you're the bossman, I'll do whatever you tell me to do.[60]

– (ii) Rice's objection to Montague's conduct at the meeting was not reasonable.

Montague describes the meeting in his declaration,[61] which the Court will credit as true for purposes of the current appeal. Melvin Whitman corroborates Montague. Whitman was one of the employees of Huntsville Utilities who attended the meeting. Whitman did not observe anything overly critical of Asplundh or its personnel in the way Montague conducted himself at the meeting.[62]

– (iii) Montague had spoken up on behalf of African-American employees, including recently.

Montague on several occasions had spoken up on behalf of African-American employees, including very recent concerns raised by Montague in the spring of 2001.[63] According to Asplundh's Compliance Supervisor, Kerry Miller, on one occasion Montague complained about race discrimination by the prior General Foreman, Joey Parrish.[64] As an outcome of Montague's complaint, Parrish was terminated.[65]

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[60] Doc 39-Montague deposition, pp.124-25.

[61] Doc 42-Montague Declaration, ¶13.

[62] Doc 42-Whitman Declaration, ¶¶6-7.

[63] Doc 42-Montague Declaration, ¶¶9-11.

[64] Doc 39-Miller deposition, pp.22-24.

[65] Doc 39-Miller deposition, p.24.

– (iv) Rice was pushing Montague to leave Alabama in order to take a promotion in Atlanta, but Montague declined.

Four days prior to the confrontation, Rice had been pushing Montague to leave Alabama in order to take a promotion in Atlanta. Montague declined, which made Rice angry.[66] During the argument after the meeting with Huntsville Utilities, April 9, 2001, Rice was still urging Montague to take the job in Atlanta. This was shortly after Montague had raised concerns about disparity in treatment of black employees.[67]

– (v) Montague was fired without ever having an opportunity to reply to Rice's accusation.

Based on the verbal and written reports he received from Rice and Rowell, Kerry Miller (the alleged decision maker) had no idea that Rice ever raised his voice at all. Both of the written statements from Rice and Rowell omit any argumentative behavior by Rice.[68] Miller never spoke with Montague about the incident nor received any written report from Montague about it.[69] Miller could not possibly have made an accurate, unbiased decision as to whether Rice may have provoked the argument for reasons of race and retaliation, when Miller never even informed himself as to the facts of the event.

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[66] Doc 42-Montague declaration, ¶12.

[67] Doc 42-Montague declaration, ¶18.

[68] Doc 39-Rice deposition, Exhibits 1 and 2.

[69] Doc 39-Miller deposition, pp.51-52.

Insubordination can be highly subjective. It is especially subjective in the current case, where the alleged insubordination involves issues of disrespect rather than a refusal to obey orders or to perform duties. Montague neither disobeyed Rice nor refused to work; rather, the alleged insubordination is that he was too argumentative. In this circumstance, it is very telling that the purported decision maker, Kerry Miller, did not make any effort whatsoever to hear Montague's side of the story.

– (vi) Asplundh's witnesses testified falsely about the basis for the decision to fire Montague.

In his testimony Miller asserted that he was the sole decision maker.[70] He asserted that neither Rice nor Parham made any recommendation as to whether Montague should be fired.[71] Prior to Miller's testimony, however, in its Responses to Interrogatories, Asplundh stated that the decision was made by all three individuals – Miller, Rice and Parham. In its response to Interrogatory 6, Asplundh states, "Troy Rice (General Foreperson), Kerry Miller (Supervisor), and Randy Parham (Supervisor) made the decision to terminate plaintiff's employment."[72]

According to Miller, his knowledge of Montague's wrong-doing came solely from written statements. Miller asserts that he received two written statements from Rice, and the statements were written by Rice and Rowell.[73] Miller testified that he decided to fire Montague based

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[70] Doc 39-Miller deposition, p.30.

[71] Doc 39-Miller deposition, pp.45-47.

[72] Doc 46-Pg 4.

[73] Doc 39-Miller deposition, pp.30-32, 42.

upon the written statements, but his testimony is refuted because the record demonstrates that the statements were not written until after Montague was fired. Neither Rice's statement nor Rowell's statement was even written until after Montague was fired.[74]

Rowell wrote his statement on April 10, 2001, which was the day on which Montague was fired when he arrived at work.[75] Rowell testified that his statement was sent to Mr. Miller *after* Montague had been fired.[76] Rice confirmed that Rowell's statement was written after Montague was fired.[77] Rice's own statement was written two days after Montague was fired. Mr. Rice dated it April 12 in his own writing.[78] After Miller received the written statements, which was after Montague was fired, Miller met with Parham to discuss the matter.[79] Miller had the written statements with him when he met with Parham.[80]

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[74] Doc 39-Exhibits 1 and 2 to Rice deposition.

[75] Doc 39-Rowell deposition, pp.26-29; Exhibit 2 to Rice deposition.

[76] Doc 39-Rowell deposition, p.30.

[77] Doc 39-Rice deposition, p.65.

[78] Doc 39-Rice deposition, pp.68-69 and Exhibit 1.

[79] Doc 39-Miller deposition, pp.46-47; Doc 57-Pg 8.

[80] Doc 47-Miller deposition, p.47.

REASONS FOR GRANTING THE WRIT

I. THE ELEVENTH CIRCUIT HAS DEPARTED FROM THE JURISPRUDENCE OF THIS COURT AND THAT OF THE OTHER CIRCUITS BY REQUIRING A CLOSELY SIMILAR COMPARATOR AS THE SOLE METHOD FOR AVOIDING SUMMARY DISPOSITION.

Thomas v. Wal-Mart Stores, Inc.

Summary judgment is unavailable unless no reasonable factfinder could draw an inference of discrimination. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510 (1986). A reasonable jury may well infer that the real reason that Wal-Mart wanted to be rid of Thomas was his race and/or in retaliation for his race-related reports and requests for transfer. Nonetheless, the Eleventh Circuit held that Thomas failed to make out a prima facie case of discrimination, and that Thomas failed to raise a genuine issue of material fact regarding pretext. The Eleventh Circuit held, "Because Thomas has not substantiated his allegation that he was replaced by someone outside of the protected class, he must provide evidence of a similarly situated employee outside of the protected class whom Wal-Mart treated differently." (Opinion, p.13)

This Court has repeatedly emphasized the flexibility of the prima facie standard. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 122 S.Ct. 992 (2002). The prima facie case "relates to the employee's burden of presenting evidence that raises an inference of discrimination." *Id.*, 534 U.S. at 510, 122 S.Ct. at 997. Thomas establishes a prima facie case that the company fired him due to intentional race discrimination or due to retaliation. He was a successful employee, doing a good job as Assistant Manager, until he

raised racial concerns. Then he was fired suddenly for a laundry list of minor criticisms, which were gathered by Wal-Mart's decision maker by means of heavy-handed solicitation of complaints. A reasonable juror may well draw the inference of intentional discrimination and/or retaliation, based upon evidence that Thomas was not guilty of misconduct, and that the investigation was undertaken in bad faith. All the supervisors in the chain of command above Thomas were white, and all the persons who took part in the so-called "investigation" (including the decision-maker Jay Parker) are white. Dennis Bailey, the employee who triggered the investigation, was a subordinate of Thomas who was an explicit racist. Thomas had alerted his supervisors to racial problems involving some of his subordinates.

A reasonable juror might readily find that the explanation proffered by Wal-Mart is not the real reason. The juror might reach that conclusion because none of the improprieties alleged against Thomas are plausible reasons to fire him, in light of his more than satisfactory performance. The origin, nature and timing of the investigation are a reasonable basis for such a verdict. Thomas has cast substantial doubt on the plausibility of the explanation offered by Wal-Mart, but the Eleventh Circuit required more. The Court of Appeals' rejection of Thomas' evidence of pretext is error under *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S.Ct. 2097 (2000), which held:

> [B]ecause a prima facie case and sufficient evidence to reject the employer's explanation may permit a finding of liability, the Court of Appeals erred in proceeding from the premise that a

> plaintiff must always introduce additional, independent evidence of discrimination.

Reeves, 120 S.Ct. at 2109.

Granted, Thomas cannot identify any similarly situated white comparators who faced closely similar circumstances. Nonetheless, there is ample evidence to support his allegation that Wal-Mart's explanation that he was fired for misconduct is a trumped-up reason. The persons who were responsible for firing Thomas were white persons whose so-called "investigation" was a vicious attempt to find misconduct where none existed. The vicious nature of the investigation is demonstrated by the testimony of disinterested third parties who are employees who observed it.

Montague v. Asplundh Tree Expert Co., Inc.

The Eleventh Circuit held that Montague made out a prima facie case of discrimination and retaliation regarding Asplundh's motivation for firing him. (Opinion, pp.6 & 8)

The Court of Appeals rejected Montague's evidence of pretext (Opinion, pp.7-9), holding that Montague's claims failed because he "produced no evidence that similarly situated non-minority employees were not discharged for similar conduct." (Opinion, p.7 n.1) Regarding Montague's discrimination claim, the Court of Appeals held, "Montague, in response, failed to produce evidence to demonstrate to a reasonable fact finder that Asplundh's proffered reason for his termination was mere pretext." (Opinion, p.7) Regarding the retaliation claim, the Court of Appeals held the same: "Once again, in response, Montague has failed to offer rebuttal evidence that Asplundh's proffered

reason for his termination was mere pretext." (Opinion, pp.8-9)

Granted, Montague produced no evidence of closely similar comparators. Granted, that sort of direct comparison to white employees can be a very compelling type of circumstantial evidence indicative of discrimination. But Montague is not limited to only one particular form of circumstantial evidence. As in *Thomas*, the Court of Appeals rejection of Montague's evidence of pretext is error under *Reeves*, *supra*, 530 U.S. at 149, 120 S.Ct. at 2109.

Montague shows that the company's witnesses are caught in inaccurate testimony about the termination decision. Miller testified he based the decision on two written documents, but the documents were written after Montague was fired. The inaccurate testimony is material, and certainly appears to be intentionally false rather than mistaken. Under *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 511, 113 S.Ct. 2742, 2749 (1993), this "suspicion of mendacity" is rebuttal evidence which bolsters the prima facie case such that a reasonable jury may well infer that the articulated reason is a pretext for discrimination or retaliation.

II. THE ELEVENTH CIRCUIT DEPARTED FROM THIS COURT'S DIRECTION BY DECLINING TO ALLOCATE THE BURDEN OF PROOF TO THE EMPLOYER ON THE "SAME DECISION" DEFENSE.

In both of these cases, there is circumstantial evidence that discriminatory and retaliatory motives played a part in the way the employer approached its decision to fire the

plaintiff. The circumstantial evidence includes retaliatory statements which fall short of direct evidence. In *Thomas,* for example, Store Manager Leverette criticized Thomas' reports as "injecting race into everything,"[81] even though the reports involved subordinate employees using racial slurs. In *Montague,* on the day that Montague was fired, the General Foreman Troy Rice expressed his annoyance by stating, "I am getting sick of this black and white issue up here, I'm getting sick of this racism issue . . . . "[82]

In both cases the employer asserted the "same decision" defense.[83] If the employer would have made the same decision in the absence of the unlawful motives, the company can prevail. In both cases the plaintiff argued that the burden of proof shifts to the employer on that issue. The Court of Appeals rejected the plaintiff's contention regarding the shift of the burden of proof to the employer.

In *Montague* the Court of Appeals held, in error, that "contrary to Montague's assertion, the Supreme Court's recent decision in *Desert Palace, Inc. v. Costa,* ___ U.S. ___, 123 S.Ct. 2148 (2003), does not remove Montague's burden to show discriminatory pretext." The Court of Appeals was

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[81] Doc 27-Exhibit 8.

[82] Doc 39-Montague deposition, pp.124-25.

[83] In *Thomas,* Doc 3, Answer, Fourth Defense: "Even if an improper or impermissible motive played any role in the challenged employment actions, the same actions would have been taken without regard to the improper or impermissible motive." In *Montague,* Doc 5-Pgs 3-4, Answer, Sixth Affirmative Defense: "Even if a protected activity (such as race or complaints of discrimination) was a factor in the alleged employment action, which it was not, the same decision would have been made without regard to such factor."

wrong, because the pretext method is not the exclusive method of proof available to Montague.

Prior to the holding in *Desert Palace,* in the Eleventh Circuit the only alternative to the pretext method was for a plaintiff to provide direct evidence of discrimination. Neither Thomas nor Montague provides any direct evidence. After *Desert Palace,* however, an alternative to the pretext method is available even absent direct evidence. Where there is circumstantial evidence that discriminatory and retaliatory motives played a part in the employer's decision, the substantive burden of proof shifts to the defendant to prove that it would have made the same decision absent the unlawful motives. This Court held that direct evidence is not required:

> In order to obtain an instruction under §2000e-2(m), a plaintiff need only present sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that "race, color, religion, sex or national origin was a motivating factor for any employment practice." Because direct evidence of discrimination is not required in mixed motive cases, the Court of Appeals correctly concluded that the District Court did not abuse its discretion in giving a mixed-motive instruction to the jury.

Desert Palace Hotel, Inc. v. Costa, 123 S.Ct. at 2155.

In order to obtain summary judgment, Wal-Mart and Asplundh respectively each must show that it can carry its substantive burden of proof. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 254, 106 S.Ct. 2505, 2513 (1986) ("[I]n ruling on a motion for summary judgment, the judge must view the evidence presented through the prism of the substantive evidentiary burden."). Thus, summary

judgment is not available under *Desert Palace.* Summary judgment may not be awarded because the employer has the substantive burden of proof, and because at the summary judgment stage the Court will view all of the evidence in the light most favorable to, and will draw all reasonable inferences in favor of, the party opposing the motion. *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S.Ct. 993, 994 (1962) ("On summary judgment the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion.").

CONCLUSION

This Court should grant the writ and reverse the judgments below. Respondents' Motions for Summary Judgment should have been denied.

Respectfully submitted,

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[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 03-11718
Non-Argument Calendar

D.C. Docket No. 01-01326-CV-S-NB

COREY THOMAS,

Plaintiff-Appellant,

versus

WAL-MART STORES, INC.

Defendant-Appellee.

Appeal from the United States District Court for the
Northern District of Alabama

(Filed October 30, 2003)

Before ANDERSON, BIRCH, and BLACK, Circuit Judges

PER CURIAM:

Plaintiff-appellant, Corey Thomas, appeals the district court's grant of summary judgment to Wal-Mart Stores, Inc. ("Wal-Mart"). Thomas alleges that Wal-Mart discriminated against him because of his race in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* and 42 U.S.C. § 1981 when they terminated his employment. In addition, Thomas alleges, pursuant to Title VII, that Wal-Mart's decision to fire him

was unlawful retaliation for Thomas's complaints about racial discrimination within the corporation. After review, we AFFIRM.

I. BACKGROUND

Thomas began working at the Wal-Mart store in Madison, Alabama on 24 August 1998. R1-27, Exh. 1, Exh. 4. Over the next year and a half, Thomas was promoted several times with his final position being assistant manager during the night shift at Wal-Mart's Guntersville, Alabama store. R1-27, Exh. 1 at 58-59, 103-05.

The Guntersville Store Manager, Tom Laverty, advised Thomas when he first arrived that Thomas should expect to remain on the night shift for six months. *Id.* at 105. Before the six months lapsed, however, Laverty left the Guntersville store and Larry Leverette became the new store manager. *Id.* at 129. In November or December of 1999, Thomas asked Leverette to take him off the night shift. *Id.* at 175-76. Leverette denied that request, explaining that there were no other qualified individuals to fill the night shift position. *Id.* On 31 January 2000, Leverette evaluated Thomas, rating him as having met expectations in two areas, and having exceeded expectations in three areas. *Id.* at 154-56. During the evaluation process in January of 2000, Thomas again asked Leverette to move him from the night shift or to transfer him to another store. R1-27, Exh. 3 at 7. Leverette again denied Thomas's request. *Id.* at 11. When requesting the transfer, Thomas told Leverette that some subordinate employees had made what Thomas considered to be racial comments about him. *Id* at 38. Specifically, Thomas told Leverette that one subordinate had referred to Thomas as a "nigger" and

another had stated that Thomas had "this system backwards. I'm supposed to tell [Thomas] what to do. He's not supposed to tell me what to do." *Id* at 37, 40. In addition, Thomas told Leverette that he felt associates were looking through him and talking at him rather than to him. *Id.* at 37-38.

In early February 2000, just after the evaluation, Thomas also talked to the district manager, Jay Parker, about being transferred off the night shift or to another store. R1-27, Exh. 1 at 192-93. At this meeting, Thomas told Parker about a conversation Thomas had with Leverette in which Leverette told Thomas that it was Leverette's "experience [] that if a promotion was available in the company and a black or a female applied for it, they had a . . . better opportunity to get it than anybody else." *Id.* at 194. Thomas testified in his deposition that, at the time of his meeting with Parker, he believed the meeting to be a complaint of race discrimination. *Id* at 196.

Also in early February 2000, Thomas asked Leverette again about being moved from the night shift. R1-27, Exh. 3 at 47. Once more, Leverette denied the request. *Id.* At this point, Thomas asked Leverette if he would have to file a complaint with the EEOC to advance his career. *Id.* Thomas testified that he believed, to some degree, that Leverette was keeping him on the night shift because he was black and because he "was being punished for doing a great job." *Id.* at 48. Thomas also advised Leverette that rumors were circulating around the store that he was having sexual affairs with certain white female employees. *Id.* at 42-43.

In late March or early April 2000, Wal-Mart held its annual "grass roots" meeting in all of its stores. R1-16, Exh. 1, Aff. 2 at 2, Aff. 4 at 2. A grass roots meeting is a meeting conducted by the company's associates where they voice concerns about Wal-Mart's management. R1-27. Exh. 3 at 76. Thomas did not attend the meeting. *Id.* at 76-77. At the meeting, several associates complained that Thomas regularly injected race into discussions with associates, that they did not observe Thomas walking around the store, that he did not properly supervise them because he spent hours playing cards with female associates in the manager's office, and that he did not perform substantial work as had previous night assistant managers. R1-27, Exh. 8 at 1. Two of the associates, through declarations proffered by Thomas, opined that the managers running the grass roots meeting, Leverette and Keith Becton, encouraged negative comments about Thomas and that the meeting was "solely devoted to bashing" Thomas. R1-16, Exh. 1, Aff. 2 at 2, Aff. 4 at 2. After the meeting, Thomas had a discussion with an associate about what was said in the grass roots meeting and confronted him as to why he did not stand up for Thomas in that meeting. R1-27, Exh. 3 at 138-39. Wal-Mart has a policy that managers such as Thomas are not permitted to question associates about the content of any grass roots meeting, as the content of that meeting is to remain confidential. *Id.* at 77-78; R1-27, Exh. 8 at 1.

Shortly after the grass roots meeting, Thomas and a subordinate employee, Dennis Bailey, were involved in an altercation. Exactly what happened is in dispute. Bailey alleges that Thomas learned that Bailey had stated that he was surprised to see Thomas actually working and that it must have been a result of the grass roots meeting.

R1-27, Exh. 9. In a written statement, Bailey states that Thomas told him, "I was going to get mine and that I would get what was coming to me and I had messed with the wrong brother!" *Id.* at 2. Another employee corroborated that he overheard Thomas making a statement to Bailey about "messing with the wrong brother" but could not remember exactly what Thomas said. R1-27, Exh. 10. Thomas denied making the statement and averred that he confronted Bailey because another employee, Carri Gosnell, complained to him that Bailey had "chastised" her for communicating with Thomas and was bothering her about the grass roots meeting. R1-27, Exh. 3 at 83-84. Thomas alleges that Bailey told Thomas during this altercation that Thomas would lose his job because Leverette had "told [Bailey he] could call [Leverette] if [Thomas] retaliated against him from grass roots." *Id* at 8485.

After this confrontation, Bailey telephoned Leverette from the store and told Leverette that he was going to call the police because he felt that Thomas had threatened him. R1-27, Exh. 4 at 21. Leverette reported the incident to Parker who responded by ordering Thomas to be moved to the day shift, away from Bailey, and ordering Leverette to investigate the matter. R1-27, Exh. 28 at 34, 39. In addition, Leverette told Parker about the associates' comments about Thomas at the grass roots meeting and that several associates were complaining that Thomas was asking them about what happened in grass roots. *Id.* at 33-34. Parker asked Leverette to "check into it and find out what's going on." *Id.* at 34.

On 5 June 2000, Thomas requested an open door meeting with Parker to discuss what he had believed was racial discrimination against him by Leverette and other individuals at the Guntersville store. R1-27, Exh. 21 at 1.

Thomas met Parker, advising him that he was not given a fair chance by management, associates, and the community because he was African-American. R1-27, Exh. 8 at 1. Thomas also stated that he had been falsely rumored to have affairs with many of the women in the store. *Id.*

As a result of Parker's investigation, numerous other complaints of Thomas's inappropriate statements and conduct in violation of company policy emerged. R1-27, Exh. 8 at 2. For example, one employee stated that Thomas said to her "until you see me stick it in and pull it out, I'm not having an affair." R1-27, Exh. 13. Two witnesses stated that, while Thomas was taking new hires on an orientation tour of the store, he stopped at the bakery to make a joke about a cake decorated with gardening tools. Thomas asked if the cake came with a real "ho," and whether the man receiving the cake could handle a "ho." R1-27, Exh. 19; Exh. 20 at 1-2. One of these witnesses also stated that Thomas once described a female associate as "wearing a dress that just won't stop." R1-27, Exh. 19. Another witness, David Tyler told Parker that Thomas had told him that Thomas would meet a female associate, Kelly Townson, in the tire lube express restroom where they would kiss and fondle each other. R1-27, Exh. 22 at 1. All of these statements arguably violate Wal-Mart's policy against harassment and inappropriate conduct. This policy defines harassment/inappropriate conduct broadly and lists examples which "may, depending on the totality of the circumstances, constitute sexual harassment" including, but not limited to: sexual innuendos, suggestive comments or questions about sexual activities, foul or obscene language or gestures, and gossiping or spreading rumors or lies about other associates. R1-27, Exh. 1, Exh. 14 at 1-2.

Parker further investigated Tyler's statement trying to discover whether there had been any sexual contact between Thomas and Townson. Although both Thomas and Townson denied this allegation, R1-27, Exh. 3 at 91; R1-16, Exh. 1, Aff. 5 at 2, Parker testified that when he interviewed Townson she admitted that her husband had recorded Townson and Thomas "making sexual conversation" on the telephone. R1-27, Exh. 28 at 43.

During the investigation, Parker also found out about a party held in the store's break room celebrating Thomas being moved from the night to the day shift. Several of the associates gave Thomas a small tree with condoms hanging off of it. R1-27, Exh. 3 at 120-26. Violating Wal-Mart policy, Thomas chose not to report the associates for inappropriate conduct. *Id.* at 147; R1-27, Exh. 1, Exh. 14 at 3. Instead, Thomas improperly took the tree out of the store's back door. R1-27, Exh. 3 at 125-26, 150.

Parker fired Thomas on 30 June 2000, explaining that he was being fired for an accumulation of reported violations involving sexual harassment and inappropriate conduct that amounted to gross misconduct. *Id.* at 94-95, R1-27, Exh. 28 at 41. During this conversation, Parker also mentioned the alleged sexual relationship between Thomas and Townson as a reason for Thomas's termination. However, the memo Parker signed notifying Thomas of the reasons for his termination did not mention Townson, but listed the following conduct policy violations:

* Going to associates who were using the open door policy and inquiring as to what was discussed between them and management [ ]

* Giving a verbal threat to an hourly associate, believed to be in retaliation to him speaking out in a grass roots meeting about [Thomas]

* Using language to more than one female associate that had sexual overtones or more explicit meaning in relation to sexual innuendoes, and engaging in joke telling of the same nature. Failing also to report or to correct the actions of others that had sexual overtones [ ]

* stating to another assistant sexual actions between [Thomas] and a female associate in the restroom of the [tire lube express]

* making inappropriate comments in the presence of new hires as you were showing them around the store; statements of how hot a female associate looked in a dress she was wearing and comments about a cake that was being made for a customer in the bakery.

R1-27, Exh. 5.

On 22 May 2001, through his attorney, Thomas, a black male, filed an employment discrimination and retaliation complaint pursuant to Title VII and § 1981. R1-1-1. Thomas alleges that he was fired without good cause and that Wal-Mart "engaged in pretext by informing [Thomas] of the false explanation that he was fired for 'inappropriate conduct and sexual harassment.'" R1-1-3. Thomas then alleges that a "motivating factor for the unlawful actions alleged in [this complaint] was intentional discrimination on the basis of

race and sex."[1] *Id.* In addition, Thomas also alleges that his termination was in retaliation for "complaints and concerns about race discrimination" that he raised in "conversations with management personnel [at Wal-Mart] including but not limited to Steve Bristow, Larry Leverette, and Jay Parker." *Id.* at 2.

Wal-Mart answered the complaint, admitting that it had terminated Thomas but denying all allegations of race discrimination or retaliation. R1-3-2. Shortly thereafter, Wal-Mart filed a motion for summary judgment and a corresponding memorandum of law in support thereof R1-10; R1-26.

The magistrate judge prepared a report recommending summary judgment which the district court adopted in its entirety. R1-32, R1-35-1. The magistrate judge determined that Thomas had set out a *prima facie* case for race discrimination and assumed without deciding that Thomas had set out a *prima facie* case for retaliation. R1-32 at 13-15. Since Wal-Mart alleged a legitimate non-discriminatory reason for firing Thomas, the magistrate judge focused on whether Thomas had submitted enough evidence to create a genuine issue of material fact as to whether Wal-Mart's proffered reason was actually pretext for discrimination or retaliation. *Id.* at 16-18. The magistrate judge determined that, although Thomas denied most of the conduct Wal-Mart's investigation uncovered, he failed to offer "any evidence from which a reasonable juror might infer that the investigation was conducted in

[1] Thomas has since clarified that he is not pursuing a sex discrimination claim. R1-28 at 1.

bad faith, or that Wal-Mart knew that the allegations of misconduct were untrue." *Id.* at 17. After adopting the magistrate judge's recommendation, the district court granted summary judgment to Wal-Mart. R1-35 at 2-3. Thomas now appeals this ruling.

II. Discussion

On appeal, Thomas argues that the magistrate judge's report incorrectly found that Wal-Mart's proffered explanation for his termination was not pretext. Specifically, Thomas argues that the magistrate judge "disregard[ed]" evidence that Wal-Mart had a "prior agenda" and conducted the investigation of him in "bad faith." Appellant's Br. at 28-29.

We review a district court's grant of summary judgment *de novo*, applying the same legal standards that were applicable in the district court. *Hilburn v. Murata Elecs. N. America, Inc.*, 181 F.3d 1220, 1225 (11th Cir. 1999). Summary judgment is proper if the pleadings, depositions, and affidavits show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Turlington v. Atlanta Gas Light Co.*, 135 F.3d 1428, 1432 (11th Cir. 1998) (citation omitted).

A. Race Discrimination

A plaintiff alleging race discrimination in the employment context carries the initial burden of establishing a *prima facie* case. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S. Ct. 1817, 1824 (1973). A plaintiff establishes a *prima facie* case of race discrimination under Title VII by showing that: (1) he is a member of a

protected class; (2) he was qualified for the position; (3) he was subjected to an adverse employment action; and (4) he was replaced by someone outside of the protected class, or his employer treated similarly situated employees outside of his classification more favorably. *Combs v. Plantation Patterns,* 106 F.3d 1519, 1539 n.11 (11th Cir. 1997) (citation omitted); *Holifield v. Reno,* 115 F.3d 1555, 1562 (11th Cir. 1997). The *McDonnell Douglas* standard for a *prima facie* case also applies to discrimination suits brought under § 1981. *Sledge v. Goodyear Dunlop Tires N. America, Ltd.,* 275 F.3d 1014, 1015 n.1 (11th Cir. 2001). Once the plaintiff establishes a *prima facie* case, the employer must proffer a legitimate, non-discriminatory reason for the adverse employment action. *McDonnell Douglas,* 411 U.S. at 802, 93 S. Ct. at 1824. If the employer does so, the plaintiff must demonstrate that the employer's proffered reason is a pretext for discrimination. *Id.* at 804, 93 S. Ct. at 1825.

The magistrate judge's report which the district court adopted as the basis of its order granting summary judgment found that Thomas had established a *prima facie* case for race discrimination. As a result, the rationale for the decision to grant summary judgment was that Thomas did not present sufficient evidence that Wal-Mart's proffered reason for firing him was actually a pretext for discrimination. While we agree with the district court's decision to grant summary judgment, we do so primarily because Thomas failed to establish a *prima facie* case.

The magistrate judge based his finding that Thomas did meet his *prima facie* burden on Thomas' allegation in his complaint that his replacement was white. R1-3214. However, we cannot find anything in the record that clearly indicates who replaced Thomas. Because Thomas

has not substantiated his allegation that he was replaced by someone outside of the protected class, he must provide evidence of a similarly situated employee outside of the protected class whom Wal-Mart treated differently. Thomas has not provided any such evidence.[2] Therefore, Thomas has not established a *prima* facie case.

Moreover, even if Thomas had established a *prima facie* case, summary judgment would still be warranted because, as the district court and magistrate judge found, Thomas failed to show that Wal-Mart's proffered reasons were pretextual. For both of these reasons, the decision of the district court is AFFIRMED.

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[2] Thomas argues that he was treated differently from similarly situated employees because he was fired despite his good work performance and other white assistant managers with satisfactory work performance were not fired. Appellant's Br. at 26. The problem with this argument is that Thomas admits violating several of Wal-Mart's conduct policies. Specifically, Thomas admits speaking to associates about the grass roots meeting, failing to report the employees who gave him the condom tree and that he took the condom tree home, and making the statement to a co-worker, "until you see me stick it in and pull it out, I'm not having an affair." All of these actions were violations of Wal-Mart policy. These violations show that he is not similarly situated to all other assistant managers whose work performance was satisfactory. Thomas has not provided any evidence of any other non-minority employees who committed similar policy violations and were treated differently. Therefore, Thomas has not met his *prima facie* burden. *See*, *Silvera v. Orange County Sch. Bd.*, 244 F.3d 1253, 1259 (11th Cir. 2001) (stating that plaintiff had not met the comparator requirement because plaintiff had committed more violations than the would-be comparators).

B. Retaliation

To establish a *prima facie* case of retaliation, a plaintiff must show that (1) he engaged in statutorily protected expression, (2) he suffered an adverse employment action, and (3) there is some causal relationship between the two events. *Holifield,* 115 F.3d at 1566. As in the racial discrimination context, once the plaintiff establishes a *prima facie* case for retaliation, the employer must proffer a legitimate, non-discriminatory reason for the adverse employment action. *Id.* If the employer does so, the plaintiff must demonstrate that the employer's proffered reason is a pretext for discrimination. *Id.*

Because we find that Thomas has not introduced sufficient evidence to raise a genuine issue of material fact regarding whether Wal-Mart's proffered legitimate and non-discriminatory reasons for their decision are actually a pretext for retaliation we assume *arguendo* that Thomas has established a *prima facie,* case for retaliation.

Here, Wal-Mart has offered a legitimate, non-discriminatory reason for terminating Thomas, *i.e.*, that Thomas was terminated based on the results of an investigation into complaints against him indicating that Thomas had violated Wal-Mart policies by engaging in conduct that constituted sexual harassment and that was inappropriate for a manager. R1-27, Exh. 5. In the face of Wal-Mart's proffered reason for terminating him, Thomas must provide sufficient evidence that this reason was pretext for retaliation. *Holifield,* 115 F.3d at 1566. A review of the record reveals that Thomas has failed to do so.

Thomas argues on appeal that there is evidence that Wal-Mart's investigation of him was conducted bad faith. Specifically, Thomas points to the affidavits of Tonya

Daniel and Katrina Milligan in which both witnesses state that the grass-roots meeting was devoted to bashing Thomas. R1-16, Exh. 1, Aff. 2 at 2, Aff. 4 at 2. Thomas ignores, however, the fact that none of the complaints raised at this meeting were the basis of his termination. *See*, R1-27. Exh. 8 at 1; R1-27, Exh. 5. Further, the investigation into Thomas's behavior began not only after this meeting but after Thomas discussed the grass roots meeting with other associates in violation of Wal-Mart policy and after Thomas's confrontation with Dennis Bailey which was arguably a violation of Wal-Mart's policy against retaliation. R1-27, Exh. 28 at 34-35; 1-27, Exh. 1, Exh. 14 at 4. Because there were other reasons to begin to investigate Thomas, the opinion of two employees that the meeting was designed to elicit complaints against Thomas is not sufficient to raise a genuine issue of material fact that Wal-Mart investigated Thomas in bad faith.

Thomas also points to evidence that shows that he may not have committed particular acts uncovered during Parker's investigation. Even if some of the statements Wal-Mart attributes to Thomas are not true and accurate representations of what Thomas actually said, Thomas nonetheless fails to provide sufficient evidence of pretext. We have held that "even if a Title VII claimant did not in fact commit the violation with which he is charged, an employer successfully rebuts any prima facie case of disparate treatment by showing that it honestly believed the employee committed the violation." *Jones v. Gerwens,* 874 F.2d 1534, 1540 (11th Cir. 1989) That is, even assuming "the complaining employees interviewed by [the employer] were lying through their teeth," our inquiry "is limited to whether [the decision-maker] *believed* that [plaintiff] was guilty of harassment, and if so, whether this

belief was the reason behind [plaintiff's] discharge." *Elrod v. Sears, Roebuck and Co.*, 939 F.2d 1466, 1470 (11th Cir. 1991). Thomas has failed to provide any evidence that Parker did not believe that Thomas violated, among other things, its broad policies against sexual harassment, inappropriate conduct, and retaliation.

For example, Thomas denies that he made a statement to Bailey about "mess[ing] with the wrong brother" and argues that Wal-Mart should not have believed Bailey because Bailey is a "racist who commonly and repeatedly used the word 'nigger.'" Appellant's Br. at 33. However, Wal-Mart has a written statement from a second, objective witness who corroborates Bailey's version of events. R1-27. Exh. 10. Given this evidence, Thomas cannot show that Wal-Mart did not honestly believe that the altercation with Bailey took place as Bailey described.[3]

Further, Thomas actually admits several of the cumulative reasons set forth by Wal-Mart for his termination.

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[3] Thomas also argues that his termination was pretext because he did not engage in consensual sexual contact with Townson. The problem with this argument is that the list of reasons Thomas was fired does not include sexual contact with Townson. R1-27, Exh. 5. Instead, Thomas was fired for telling Tyler that he would meet Townson in the tire lube express and they would kiss and fondle each other. R1-27, Exh. 22 at 1. Whether these clandestine meetings actually took place does not matter because Thomas was fired for making the statement that they did happen. Thomas has not provided any evidence to show that Wal-Mart did not honestly believe that Thomas made this statement. Further, even if the relationship with Townson was cited as a basis for Thomas's termination, Thomas still has not offered any evidence that Parker did not honestly believe that a sexual relationship existed. In fact, Parker had a reason to believe that the contact did occur because Parker had both Tyler's statement and Townson's admission that she engaged in sexual conversation with Thomas.

Specifically, Thomas admits (1) that he accepted the condom tree gift from the associates and took no action against the employee who gave it to him, (2) that he told a female associate, "Until you see me stick it in and pull it out, I'm not having an affair," and (3) that he spoke with associates about the grass roots meeting. Even if we were to believe that these were not appropriate reasons to terminate Thomas's employment, it is not our role to second-guess the business judgment of an employer. *Combs*, 106 F.3d at 1543. That is, an "employer may fire an employee for a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all, as long as its action is not for a discriminatory reason." *Nix v. WLCY Radio/Rahall Communications*, 738 F.2d 1181, 1187 (11th Cir. 1984).

III. CONCLUSION

We conclude that Thomas has failed to establish a *prima facie* case of race discrimination and has failed show sufficient evidence to raise a genuine issue of material fact regarding whether Wal-Mart's proffered legitimate, non-discriminatory reason for firing him was pretext for retaliation. Therefore, the district court did not err by granting Wal-Mart's motion for summary judgment.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

COREY THOMAS, Plaintiff,	)	Case No. CV-01-TMP-1325-NE
v.	)	
WAL-MART STORES, INC., Defendant.	)	

REPORT AND RECOMMENDATION

(Filed Mar. 19, 2003)

This cause is before the court on the motion for summary judgment filed August 6, 2002, by the defendant, Wal-Mart Stores, Inc., ("Wal-Mart"). Defendant seeks dismissal of all of plaintiff's claims of race discrimination, retaliation, and defamation. This matter has been fully briefed and the court has considered the evidence and the arguments set forth by both parties. The parties have not consented to the exercise of jurisdiction by the undersigned pursuant to 28 U.S.C. § 636(c); accordingly, the court submits this report and recommendation.

I. FACTS

Corey Thomas, the plaintiff, is an African-American male. He worked for defendant Wal-Mart from August 24, 1998, until June 30, 2000. He was hired at the Madison, Alabama, store to work the overnight shift (10 p.m. until 7 a.m.) as a stocker. Thomas has stated that he wanted the overnight shift because it worked well with his personal life. On October 28, 1998, Thomas was promoted to overnight

support team manager. Thomas was questioned by some co-workers about his age and length of service with Wal-Mart, and he has testified that some co-workers accused him of having been promoted because he was black, based on their observations that other employees (presumably white) with longer service were not promoted. Thomas felt some associates resented his promotion. Other than the resentment, Thomas did not experience any problems at the Madison Wal-Mart. Thomas testified that Wal-Mart had identified his leadership potential early in his employment, and was mentoring him and moving him into management positions at a fast rate.

Soon after the promotion, Thomas began Wal-Mart's management training program. The manager of the Guntersville store, Tom Laverty, was impressed with Thomas' presentation at the first seminar. Laverty requested that Thomas be assigned to the Guntersville store. Thomas was transferred, promoted to receiving assistant manager for the Guntersville store, and assigned to work the overnight shift. Thomas has stated that his race had "no bearing" on the assignment to work the overnight shift, but that the assignment was based on his experience and his "excellent people skills." As the only night manager on duty, Thomas supervised 30-45 associates, handled customer complaints, and oversaw security issues, in addition to his duties in the receiving department.

On May 8, 1999, Thomas was again promoted, this time to assistant manager at the Guntersville store. While Thomas was an assistant manager, the store had six assistant managers; three were white and three were black. One of the black assistant managers, Douglas Toney, preceded Thomas on the overnight shift. When Thomas transferred into the Guntersville store, Toney was

moved to the day shift. After spending a couple of years in the Guntersville store, Toney was transferred to the Huntsville store. Thomas requested a move off the night shift, and Laverty told Thomas he expected to keep him on nights for about six months. Laverty left the store before the six month period ended, and Larry Leverette became the new store manager.

Thomas asked Leverette for a transfer to day hours or to another store in November or December 1999. Leverette told Thomas that he was unable to fill Thomas' night position at that time because he did not have an associate with the requisite experience, but that he would reconsider the request in a few months. During the same time frame, Thomas asked a district manager, Steve Bristow, for a transfer. Thomas was not transferred. On January 31, 2000, Leverette evaluated Thomas, rating him as having met expectations in two areas, and having exceeded expectations in three areas. Thomas has testified that the evaluation was incomplete, but he does not assert that it was discriminatory or retaliatory.

During the evaluation process, Thomas again asked Leverette for a transfer to another store or to be moved from the night shift. Leverette refused, and told Thomas he didn't think Thomas would do well on the day shift and that he was "too direct" for the day shift. Another black assistant manager was given a transfer to another store, but Thomas was kept on overnight duty at Guntersville. Thomas met with Jay Parker, the Wal-Mart district manager who succeeded Bristow, and also requested that he be taken off the night shift. He did not complain at that time that he was being treated differently because of his race.

A couple of weeks after the evaluation was completed, Thomas again asked Leverette for a transfer.[1] Leverette refused the request. Early in 2000, Thomas also told Leverette about incidents in which he felt that associates "looked through" him or "talked at" him, and that he had been told that some associates had made racial comments about him, and referred to him as a "nigger."[2] In expressing his desire to transfer to another store, Thomas also told Leverette that rumors were circulating in the store that he was having affairs with associates Kelly Townsend, Katrina Milligan, and other female associates. Thomas does not allege that the rumors were based on his race. During the same time frame, Thomas was told by an associate that Leverette had said that blacks and females had a better opportunity for promotion than other employees.[3]

On the third and last occasion that Thomas asked Leverette for a change in his hours, Leverette told Thomas

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[1] Thomas stated that he wanted the transfer because of a threatening phone call he received in which he was called a "nigger," and an incident in which a racial epithet was used against him by a customer. He also alleged that an associate referred to him as a "nigger," and said that Thomas has "this system backwards" because the associate should be telling Thomas what to do. The phone call and customer's epithet are in no way attributed to Wal-Mart.

[2] There is no evidence that any comment was ever made to Thomas, but rather that other employees told Thomas about comments they had overheard.

[3] Leverette has denied making that statement, and has said he did say that in his experience at Wal-Mart, blacks and females had as much opportunity for advancement as any other employees. He testified that when he interviewed Kelly Townsend, a white female, she asked him if being a minority affected her ability to be promoted, and he told her that "females and blacks can advance just as well as anyone."

that he could not "force" him to change his shift. Thomas responded by asking him if he would have to file a complaint through the EEOC to progress his career. Thomas says that his statement meant that he was starting to feel that he "was being punished for doing a great job on the third shift." In response to Thomas's statement regarding the EEOC, Leverette told Thomas he would have to remain on the overnight shift until his year was up.[4]

Shortly before Thomas's third meeting with Leverette concerning transfer or shift change, the store conducted a "grass roots" meeting, in which associates were invited to discuss their job concerns and problems. Several associates complained that Thomas did not properly supervise them, stayed in the office playing cards with a few female associates during work hours, and did not do as much work as previous overnight managers. Some of the associates have testified that the managers wanted to hear only negative comments about Thomas.

After the meeting, Thomas questioned associates about their participation in the meeting. On one occasion, a white associate, Dennis Bailey commented that he was surprised to see Thomas working. Bailey later complained that, after his comment Thomas said to him: "You are messing with the wrong brother." Thomas later confronted Bailey about complaints that Bailey was bothering a female associate by trying to tell her about the grass-roots meeting. Bailey then called Leverette during the overnight shift, and told that he wanted to call the police because he

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[4] Thomas has testified that promotions he was hoping for required him to remain in the position of assistant manager for at least one year.

felt threatened by Thomas. Bailey filed a grievance alleging he was threatened and that Thomas had made racial slurs. Bailey said he was not comfortable working with Thomas. To prevent Thomas and the associate from having to work together, Leverette moved Thomas to the day shift.[5] Leverette also began an investigation into the complaints about Thomas.

Upon Thomas's reassignment to day shift, some of the associates on the night shift, including three of the female associates with whom Thomas had been rumored to be having affairs, gave Thomas a gift of a tree-shaped holder decorated with condoms. They presented the gift to him in an office at the Wal-Mart. When Thomas saw the gift, he told the associates: "if Jay and Larry [Parker and Leverette] walk in here right now, we'll all need a job." Thomas took the tree out the back door of the store and loaded it into his car.

At some time during the investigation, Leverette left the store and Mike Cantrell took over as store manager. In a memo to the regional personnel manager for Wal-Mart, Parker reported the results of the investigation into Thomas' conduct. Parker documented 13 incidents which Parker stated were violations of Wal-Mart policy or were examples of inappropriate conduct. Parker stated that most of the alleged violations were supported by statements signed by associates. Many of the violations involved sexual conduct. In essence, Parker reported that Thomas had

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[5] Leverette has stated that the altercation between Thomas and Bailey was only one of several reasons for the shift change, but he has not articulated any other reasons.

made inappropriate sexual statements to associates, had violated the confidentiality provisions of the open door policy, and had engaged in other conduct that was violative of Wal-Mart policies.[6] Jay Parker made a recommendation that Wal-Mart fire Thomas as a result of the conduct uncovered during the investigation.

On June 30, 2000, Parker fired Thomas. Parker informed Thomas he was being fired for sexual harassment and inappropriate conduct. Parker said a female associate had admitted that she met Thomas in the restroom area of the tire and lube center, where they would kiss and fondle each other. Parker also told Thomas that he was being fired for intimidating Bailey and seeking to retaliate against Bailey for comments made at the grass roots meeting. Parker testified that the number of violations amounted to gross misconduct, which was grounds for termination.

After Thomas was fired, The Alabama Department of Industrial Relations Unemployment Compensation contacted Parker about Thomas. Thomas alleges that Parker told the caller that Thomas had more than 20 complaints of sexual harassment lodged against him while working at Wal-Mart. Parker's alleged statement, Thomas asserts, is defamatory under Alabama law.[7]

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[6] Thomas denies engaging in much of the conduct alleged, but has admitted that he told a manager of the cashiers that he was not having an affair with an associate by stating: "Until you see me stick it in and pull it out, I'm not having an affair."

[7] Because the defamation claim is a state-law claim with no independent basis upon which the court may exercise subject matter jurisdiction, the court declines to exercise jurisdiction over the state-law

(Continued on following page)

On August 2, 2000, Thomas filed a charge of discrimination with the Equal Employment Opportunity Commission. On May 22, 2001, he filed the complaint commencing this action, and asserting claims of race and sex discrimination, retaliation, and defamation.[8] In Plaintiff's Brief in Opposition to Summary Judgment, Thomas asserts two claims against Wal-Mart: (1) that he was a victim of intentional discrimination because of his race; (2) that he was retaliated against for complaining to Wal-Mart officials about race discrimination.

II. SUMMARY JUDGMENT STANDARD

Under Federal Rule of Civil Procedure 56(c) summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The party asking for summary judgment "always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the

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cause of action, and finds that the claim is due to be dismissed. The court may decline to exercise supplemental jurisdiction over a claim when the court has dismissed all of the claims over which it has jurisdiction. 28 U.S.C. § 1367(c)(3); *see also, Graham v. State Farm Mut. Ins. Co.*, 193 F.3d 1274, 1282 (11th Cir. 1999).

[8] Plaintiff has testified that he is not asserting any sex discrimination claims.

absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (quoting Fed. R. Civ. P. 56(c)). The movant can meet this burden by presenting evidence showing there is no dispute of material fact, or by showing that the nonmoving party has failed to present evidence in support of some element of its case on which it bears the ultimate burden of proof. *Celotex*, 477 U.S. at 322-23. There is no requirement, however, "that the moving party support its motion with affidavits or other similar materials *negating* the opponent's claim." *Id.* at 323.

Once the moving party has met his burden, Rule 56(e) "requires the nonmoving party to go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions of file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Id.* at 324 (quoting Fed. R. Civ. P. 56(e)). The nonmoving party need not present evidence in a form necessary for admission at trial; however, he may not merely rest on his pleadings. *Celotex*, 477 U.S. at 324. "[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Id.* at 322.

After the plaintiff has properly responded to a proper motion for summary judgment, the court must grant the motion if there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The substantive law will identify which facts are material and which are irrelevant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute is genuine

"if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* at 248. "[T]he judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Id.* at 249. His guide is the same standard necessary to direct a verdict: "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law. *Id.* at 251-52; *see also Bill Johnson's Restaurants, Inc. v. N.L.R.B.,* 461 U.S. 731, 745 n.11 (1983). However, the nonmoving party "must do more than show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.,* 475 U.S. 574, 586 (1986). If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted. *Anderson,* 477 U.S. at 249 (citations omitted); *accord Spence v. Zimmerman,* 873 F.2d 256 (11th Cir. 1989). Furthermore, the court must "view the evidence presented through the prism of the substantive evidentiary burden," so there must be sufficient evidence on which the jury could reasonably find for the plaintiff. *Anderson,* 477 U.S. at 254; *Cottle v. Storer Communication, Inc.,* 849 F.2d 570, 575 (11th Cir. 1988). Nevertheless, credibility determinations, the weighing of evidence, and the drawing of inferences from the facts are the function of the jury, and therefore the evidence of the non-movant is to be believed and all justifiable inferences are to be drawn in his favor. *Anderson,* 477 U.S. at 255. The non-movant need not be given the benefit of every inference but only of every reasonable inference. *Brown v. City of Clewiston,* 848 F.2d 1534, 1540 n.12 (11th Cir. 1988).

III. DISCUSSION

Wal-Mart bases its motion for summary judgment on all of plaintiff's race and retaliation claims on two grounds: (1) that plaintiff cannot establish a *prima facie* case of race discrimination or retaliation; and (2) that Wal-Mart had a legitimate, non-discriminatory reason for its termination of Thomas.

A. *Prima Facie* Case

The plaintiff may establish a prima facie case of race discrimination by showing that: (1) he is a member of a protected class; (2) he was qualified for the position; (3) he was subjected to an adverse employment action; and (4) he was replaced by someone outside of the protected class, or he was treated differently because of his membership in the class. *Combs v. Plantation Patterns,* 106 F.3d 1519, 1539 n.11 (11th Cir. 1997), *cert. denied,* 118 S. Ct. 685, 139 L. Ed. 2d 632 (1998), citing *Wu v. Thomas,* 847 F.2d 1480, 1483 (11th Cir. 1988), *cert. denied,* 490 U.S. 1006, 109 S. Ct. 1641, 104 L. Ed. 2d 156 (1989). In this case there is no dispute, and Wal-Mart concedes, that Thomas, an African-American, is a member of a protected class and was subjected to an adverse employment action. Wal-Mart further argues that he was not qualified for the assistant manager position he held because of his misconduct, and that he was not treated any differently than employees of other races.

The court finds that plaintiff has met his burden of proof with respect to his *prima facie* case of race discrimination. Assuming that Thomas's denial of the misconduct is true, which the court must do for purposes of summary judgment, the court finds that he was qualified for the

position of assistant manager. Finally, Thomas alleges that his managerial position was filled by a white female. This allegation is not refuted by Wal-Mart. Accordingly, Thomas has established a *prima facie* case of discrimination, and the burden shifts to Wal-Mart to offer legitimate, non-discriminatory reasons for firing Thomas.

In order to make a *prima facie* showing of retaliation, the plaintiff must demonstrate that: (1) he engaged in a protected activity by opposing Title VII discrimination; (2) he suffered an adverse employment action; and (3) the adverse action was causally connected to the protected activity. *See, e.g., Farley v. Nationwide Mut. Ins. Co.,* 197 F.3d 1322, 1336 (11th Cir. 1999). The causal link requirement is to be construed broadly, and the Eleventh Circuit Court of Appeals has stated that "a plaintiff merely has to prove that the protected activity and the negative employment action are not completely unrelated." *Olmsted v. Taco Bell Corp.,* 141 F.3d 1457, 1460 (11th Cir. 1998), quoting *EEOC v. Reichhold Chem., Inc.,* 988 F.2d 1564, 1571-72 (11th Cir. 1993). However, to meet even this low threshold of proof of causation, the plaintiff must offer some evidence from which a jury could infer that Thomas's complaints about race discrimination caused his termination. "At a minimum, a plaintiff must generally establish that the employer was actually aware of the protected expression at the time it took the adverse employment action.

In this case, Wal-Mart does not dispute that it knew Thomas had complained that he did not get the respect of

some associates because of his race.[9] Wal-Mart also does not dispute that plaintiff has produced evidence from which a fact-finder could determine that the complaints may have been causally related to the termination. Accordingly, the court assumes, without deciding, that plaintiff has established a *prima facie* case of retaliation. Defendant asserts that summary judgment still is due to be granted in its favor because Wal-Mart has offered legitimate reasons for Thomas's termination, and Thomas has not shown that the reasons are a mere pretext for discrimination or retaliation.

B. Wal-Mart's Non-Discriminatory Reason

Even though the plaintiff has established a *prima facie* case, his claim is due to be denied because the employer has offered a legitimate, non-discriminatory reason for its actions, and the plaintiff has failed to show that reason is pretextual.

Wal-Mart has stated that the decision to fire Thomas was based on an investigation into complaints lodged against him by employees, which indicated that Thomas had engaged in conduct that constituted sexual harassment, that was inappropriate for a manager, and that violated Wal-Mart policies. Accordingly, Wal-Mart has

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[9] Wal-Mart does not argue that Thomas's "complaints" may not constitute an "opposition to race discrimination" that would constitute a protected activity under Title VII law. The court notes, however, that Thomas's comments to Wal-Mart managers about the racial biases reflected in the attitudes of subordinates and customers does not necessarily constitute the type of opposition to discrimination that ought to be encompassed by Title VII's protections.

stated a non-discriminatory reason for its adverse employment action.

Once the employer meets its burden of articulating a non-discriminatory reason, the burden shifts back to the plaintiff to show that the reason is either not worthy of belief or that, in light of all the evidence, a discriminatory reason more likely motivated the decision than the proffered reason. *Standard v. A.B.E.L. Servs. Inc.*, 161 F.3d 1318, 1331-33 (11th Cir. 1998), citing *Combs v. Plantation Patterns*, 106 F.3d 1519, 1528 (11th Cir. 1997), *cert. denied*, 118 S. Ct. 685, 139 L. Ed. 2d 632 (1998).

Because Wal-Mart has offered a nondiscriminatory reason for the termination, Thomas must, in order to overcome the motion for summary judgment, demonstrate by competent, admissible evidence that Wal-Mart's non-discriminatory reason is merely a pretext. He must show not only that Wal-Mart's articulated reason is false, but also that the company's true reason for terminating him was discriminatory. *See Clark v. Coats & Clark, Inc.*, 990 F.2d 1217, 1228 (11th Cir. 1993). It is not the duty of this court to evaluate whether the decision to fire Thomas was fair or wise; employers are free to make unfair or unwise employment decisions so long as they do not violate anti-discrimination statutes. *See Elrod v. Sears, Roebuck and Co.*, 939 F.2d 1466, 1470 (11th Cir. 1991).

In this case, the plaintiff does not show any competent, admissible evidence that the proffered reason is a sham. Although he denies most of the conduct the investigation uncovered, he does not offer any evidence from which a reasonable juror might infer that the investigation was conducted in bad faith or that Wal-Mart knew that the allegations of misconduct were untrue. To the contrary,

Wal-Mart has supplied testimony that the initial allegations were gathered in response to a grass-roots meeting in which associates were asked to evaluate supervisors. The documents containing employee comments, produced by the defendant as evidence in support of the motion for summary judgments, show that employees made comments about several managers, not only the black managers, and not only Thomas. Moreover, the misconduct set forth in Parker's memo to Hidalgo was, in almost every instance, supported by written statements of associates who claimed to have witnessed the conduct or was an incident Thomas admitted took place. Finally, Thomas has failed to demonstrate that Parker, the decision-maker, – or, for that matter, any Wal-Mart management employee – harbored any racial animus. The only racial slurs or other remarks that could evidence discrimination were made by associates who were subordinate employees. There is no evidence that Wal-Mart encouraged or even tolerated any discriminatory conduct.

Accordingly, no fact in evidence logically calls into question the credibility of the articulated nondiscriminatory reason for Thomas's firing. The plaintiff's unsupported conjecture is not sufficient to overcome the defendant's well supported motion for summary judgment. The court's job is to consider whether the evidence "presents a sufficient disagreement to require submission to a jury." *Combs,* 106 F.3d at 1526. The court finds little or no support for a finding that the reason is a pretext. In this case, the evidence is so one-sided that the defendant must prevail. Accordingly, the motion for summary judgment as to plaintiff's race and retaliation claims are due to be granted.

IV. RECOMMENDATION

Based upon the foregoing undisputed facts and legal conclusions, the magistrate judge RECOMMENDS that the motion for summary judgment filed by defendant Wal-Mart (court document #10) be GRANTED and that the plaintiff's federal race discrimination claims be DISMISSED WITH PREJUDICE. The magistrate judge further RECOMMENDS that the plaintiff's sole remaining claim, a state-law claim of defamation, is due to be DISMISSED WITHOUT PREJUDICE, and plaintiff may re-file the claim in state court.

Any party may file specific written objections to this report and recommendation within fifteen (15) days from the date it is filed in the office of the Clerk. Failure to file written objections to the proposed findings and recommendations contained in this report and recommendation within fifteen (15) days from the date it is filed shall bar an aggrieved party from attacking the factual findings on appeal.

The Clerk is DIRECTED to serve a copy of this order upon counsel for all parties.

DATED this 19th day of March, 2003.

/s/ T. Michael Putnam
T. MICHAEL PUTNAM
CHIEF MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

COREY THOMAS,	)	
Plaintiff,	)	
	)	**Civil Action No.**
vs.	)	**CV-01-S-1326-NE**
WAL-MART STORES, INC.,	)	
	)	
Defendant.	)	

ORDER

(Filed Mar. 26, 2003)

This employment discrimination action is before the court on the Report and Recommendation of Chief Magistrate Judge T. Michael Putnam, counseling that summary be granted in favor of defendant on all claims of plaintiff, except for his supplemental, state-law, defamation claim (doc. no. 32). Upon careful consideration of the pleadings, briefs, evidentiary submissions, the Magistrate's Report and Recommendation, and plaintiff's objections (doc. no. 34), this court agrees with the Magistrate and ADOPTS the Report and Recommendation as the opinion of this court. Accordingly, defendant's summary judgment motion is GRANTED, and all of plaintiff's federal claims are dismissed with prejudice.

Further, in cases such as this, where the court's jurisdiction is based solely upon a federal question, the district court has discretion to entertain state claims that are supplemental to the federal claim. *See* 28 U.S.C.

§ 1367(a).[1] The district court may decline to exercise supplemental jurisdiction when:

> (1) the claim raises a novel or complex issue of State law,
>
> (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
>
> (3) the district court has dismissed all claims over which it has original jurisdiction, or
>
> (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

28 U.S.C. § 1367(c). As the Supreme Court has observed:

> a federal court should consider and weigh in each case, and at every stage of the litigation, the values of judicial economy, convenience, fairness, and comity in order to decide whether to exercise jurisdiction over a case brought in that court involving pendant state-law claims. When the balance of these factors indicates that a case properly belongs in state court, as when the federal-law

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[1] 28 U.S.C. § 1367(a) provides that:

> (a) Except as provided in subsections b and c or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

> claims have dropped out of the lawsuit in its early stages and only state-law claims remain, the federal court should decline the exercise of jurisdiction by dismissing the case without prejudice.

Carnegie-Mellon University v. Cahill, 484 U.S. 343, 349-50, 108 S. Ct. 614, 618, 98 L. Ed. 2d 720 (1988) (citing *Mine Workers v. Gibbs*, 383 U.S. 715, 726-27, 86 S. Ct. 1130, 1139, 16 L. Ed. 2d 218 (1966)). "[I]n the usual case in which all federal-law claims are eliminated before trial, the balance of factors to be considered under the pendent jurisdiction doctrine – judicial economy, convenience, fairness, and comity – will point toward declining to exercise jurisdiction over the remaining state-law claims." *Carnegie-Mellon*, 484 U.S. at 350 n.7, 108 S. Ct. at 619 n.7; *see also L.A. Draper & Son V. Wheelabrator-Frye, Inc.*, 735 F.2d 414, 428 (11th Cir. 1984) (stating that "if the federal claims are dismissed prior to trial, *Gibbs* strongly encourages or even requires dismissal of state claims").

Accordingly, for the foregoing reasons, as well as those noted by the Magistrate Judge,[2] plaintiff's state-law defamation claim is dismissed without prejudice.

Costs are taxed to plaintiff. The clerk is directed to close this file.

DONE this 26th day of March, 2003.

/s/ C. Lynwood Smith, Jr.
United States District Judge

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[2] *See* doc. no. 32 (Report and Recommendation), at 9 n.7.

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 03-12274
Non-Argument Calendar

D.C. Docket No. 02-00530-CV-S-NE

ANTHONY A. MONTAGUE,

Plaintiff-Appellant,

versus

ASPLUNDH TREE EXPERT CO.,

Defendant-Appellee.

Appeal from the United States District Court for the
Northern District of Alabama

(October 1, 2003)

Before BIRCH, BARKETT and HULL, Circuit Judges.

PER CURIAM:

Plaintiff-appellant, Anthony A. Montague, appeals the district court's grant of summary judgment in favor of his employer, Asplundh Tree Expert Co. ("Asplundh"), in his employment discrimination and retaliation case. We conclude that summary judgment for the defendant was appropriate, but for a reason different than was relied upon by the district court. Upon review, we conclude that Montague satisfied the burden of production for his *prima*

facie case both of discriminatory and retaliatory discharge in violation of Title VII of the Civil Rights Act of 1964, as amended, ("Title VIP") and 42 U.S.C. § 1981, but that he then failed to meet the burden of demonstrating that Asplundh's legitimate, non-discriminatory reason for firing him was mere pretext. Accordingly, we AFFIRM the judgment of the district court.

I. BACKGROUND

Montague appeals the district court's order granting summary judgment in favor of Asplundh in his race discrimination and retaliation action, which was brought pursuant to 42 U.S.C. § 1981 and Title VII, 42 U.S.C. § 2000e *et seq,* Montague alleged two claims in his complaint: (1) that he was terminated because of his race, and (2) that he was terminated in retaliation for his opposition to discrimination in the workplace. The district court granted summary judgment on the ground that Montague failed to prove his *prima facie* case under either claim.

On appeal, Montague first argues that he established a *prima facie* case of discrimination because he (1) is black, (2) was qualified for his job at Asplundh, (3) was fired, and (4) was replaced by a white employee. Furthermore, Montague contends that he provided evidence of discrimination by showing that his supervisor, Troy Rice, encouraged him to take a promotion in Atlanta, and that when Montague turned the position down, Rice allegedly expressed the true reason for his encouragement: Rice's annoyance with racial issues that he had to contend with because of Montague. Montague then maintains, based on several additional factors, that there is a genuine factual dispute regarding whether Asplundh's reason for his

termination – insubordination – was a pretext for discrimination: (1) Rice initiated and escalated the confrontation that resulted in Montague's termination, (2) Rice's objection to Montague's conduct at a meeting, which led to the confrontation, was not reasonable, and (3) Kerry Miller, the purported decisionmaker, did not inquire as to Montague's version of the insubordination incident prior to terminating him. Moreover, Montague contends, he has provided evidence of pretext by showing that Miller was not the sole decisionmaker.

Montague then argues that he established a *prima facie* case of retaliation because (1) he engaged in the protected activity of voicing opposition to racially offensive behavior and perceived discrimination in the workplace, (2) he was fired, and (3) there was a causal link between the protected activity and his termination. The link, according to Montague, is that he and Rice had discussed racial matters on Montague's last day of work and that he had recently voiced concerns over racial problems at Asplundh.

II. DISCUSSION

A district court's grant of a summary judgment motion is subject to plenary review. *Denney v. City of Albany,* 247 F.3d 1172, 1181 (11th Cir. 2001). Summary judgment is properly granted when the moving party has demonstrated that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Id.* (citations omitted). In reviewing a summary judgment motion, we must "view the evidence and all factual inferences therefrom in the light most favorable to the party opposing the motion." *Id.* (citations

omitted). Furthermore, if the district court's grant of summary judgment was appropriate, we may affirm the decision of the district court while relying on different reasoning. *See e.g., Ochran v. United States,* 273 F.3d 1315, 1316 (11th Cir. 2001); *Boz v. United States,* 248 F.3d 1299, 1300 (11th Cir. 2001); *Cohen v. United Am. Bank of Cent. Fla.,* 83 F.3d 1347, 1349 (11th Cir. 1996).

We analyze claims brought under Title VII and § 1981 in the same manner. *Shields v. Fort James Corp.,* 305 F.3d 1280, 1282 (11th Cir. 2002) (citations omitted). Thus, the following analysis applies to both claims.

A. Discriminatory Discharge

Because Montague does not contend that he has any direct evidence of racially discriminatory animus, his claims are evaluated under the analytical framework set forth in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S. Ct. 1817 (1973), and *Tex. Dep't of Cmty. Affairs v. Burdine,* 450 U.S. 248, 101 S. Ct. 1089 (1981). Under that framework, the plaintiff bears the initial burden of establishing a *prima facie* case of discrimination. *McDonnell Douglas,* 411 U.S. at 802, 93 S. Ct. at 1824. "After the plaintiff proves a prima facie case of discrimination, the defendant need only to produce evidence that there is a legitimate, non-discriminatory reason for the challenged employment action." *Kelliher v. Veneman,* 313 F.3d 1270, 1275 (11th Cir. 2002). If a defendant carries its burden of producing "admissible evidence which would allow the trier of fact rationally to conclude that the employment decision had not been motivated by [a] discriminatory animus," the presumption of discrimination "drops from the case," and "the factual inquiry proceeds to a new level

of specificity." *Burdine,* 450 U.S. at 255-57 & n.10, 101 S. Ct. at 1094-96 & n.10. The burden now becomes one of production and shifts to the plaintiff to come forward with evidence "to demonstrate that the proffered reason was not the true reason for the employment decision," but was a pretext for discrimination. *Id.* at 256, 101 S. Ct. at 1095. *See McDonnell Douglas,* 411 U.S. at 804, 93 S. Ct. at 1825.

In order to prove a *prima facie* case of race discrimination, we require the plaintiff to demonstrate that he or she was: (1) a member of a class of persons protected by the statute; (2) qualified for the position; (3) nevertheless terminated; and "(4) replaced by a person outside the protected class or suffered from disparate treatment because of membership in the protected class." *Kelliher,* 313 F.3d at 1275. "Demonstrating a prima facie case is not onerous; it requires only that the plaintiff establish facts adequate to permit an inference of discrimination." *Holifield v. Reno,* 115 F.3d 1555, 1562 (11th Cir. 1997) (citations omitted).

In this case, Montague has met his burden of production for all four elements: (1) he is black; thus, he is in a class of persons protected by Title VII and § 1981; (2) he was qualified for the position from which he was discharged, as shown by his nine year employment record with Asplundh; (3) he was terminated; and (4) he was replaced by a white employee. Thus, the burden of production shifted to Asplundh to show that Montague was terminated for a legitimate, nondiscriminatory reason.

Asplundh also has met its burden in this case. Based on our review of the record, Asplundh has shown that Montague was terminated for insubordination. Montague, in response, failed to produce evidence to demonstrate to a

reasonable fact finder that Asplundh's proffered reason for his termination was mere pretext.[1] [2] Thus, summary judgment on this claim was properly granted in favor of Asplundh.

B. Retaliatory Discharge

To establish a *prima facie* case of retaliation, the plaintiff must show that: (1) he engaged in statutorily protected expression; (2) he suffered an adverse employment action; and (3) there was a causal linkage between the protected conduct and the adverse employment action. *See, e.g., Bass v. Bd. of County Comm'rs,* 256 F.3d 1095, 1117 (11th Cir. 2001). "To establish a causal connection, a plaintiff must show that the decisionmakers were aware of the protected conduct, and that the protected activity and the adverse action were not wholly unrelated." *Id.* at 1119

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[1] We note that Montague, because he could not produce direct evidence that Asplundh's reason for firing him was pretextual, could have produced circumstantial evidence to persuade the fact finder that Asplundh's reason for terminating him is not worthy of belief. *See, e.g., Hall v. Ala. Ass'n of School Bds.,* 326 F.3d 1157, 1166 (11th Cir. 2003). For example, Montague could have produced evidence that similarly situated non-minority employees were disciplined differently based on similar conduct. *See, e.g., Holifield v. Reno,* 115 F.3d 1555, 1562-63 (11th Cir. 1997). Such evidence would allow Montague to survive summary judgment. The record in this case discloses that Montague produced no evidence that similarly situated non-minority employees were not discharged for similar conduct. In fact, the record discloses the opposite: that a white employee was fired by Asplundh for similar conduct.

[2] We note also that, contrary to Montague's assertion, the Supreme Court's recent decision in *Desert Palace, Inc. v. Costa,* ___ U.S. ___, 123 S. Ct. 2148 (2003), does not remove Montague's burden to show discriminatory pretext.

(citations omitted). Furthermore, "close temporal proximity between the protected activity and the adverse action may be sufficient to show that the two were not wholly unrelated." *Id.*

Similar to the burden-shifting framework governing the discrimination claim,

> [o]nce plaintiff establishes a prima facie case by proving only that the protected activity and the negative employment action are not completely unrelated, the burden shifts to the defendant to proffer a legitimate reason for the adverse action. The burden then shifts back to the plaintiff to prove by a preponderance of the evidence that the "legitimate" reason is merely pretext for prohibited, retaliatory conduct.

Sierminski v. Transouth Fin. Corp., 216 F.3d 945, 950 (11th Cir. 2000).

In this case, Montague may have satisfied the burden of production for his *prima facie* case. Based on our review of the record, and in light of the language of *Bass,* it is not clear that Montague's complaints regarding racial conflict and his termination were *not* wholly *un*related. Racial matters were discussed on Montague's last day of work, and he had recently voiced concerns over racial problems at Asplundh. Thus, the burden then shifts to Asplundh to produce evidence that Montague was terminated for a legitimate, non-discriminatory reason. As we have explained, Asplundh has satisfied this burden. Once again, in response, Montague has failed to offer rebuttal evidence that Asplundh's proffered reason for his termination was mere pretext. Thus, summary judgment was properly granted in favor of Asplundh on this claim as well.

III. CONCLUSION

The record shows that (1) Montague satisfied the burden of production for his *prima facie* case alleging discriminatory discharge, but did not satisfy the burden of production to overcome the presumption that Asplundh's nondiscriminatory reason for firing him – insubordination – was mere pretext; and (2) Montague arguably also satisfied the burden of production for his *prima facie* case alleging retaliatory discharge, but again did not satisfy the burden of production to prove that insubordination was mere pretext for racial discrimination. Thus, the district court correctly granted summary judgment in favor of Asplundh on both claims. Accordingly, the judgment of the district court is

AFFIRMED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

ANTHONY A. MONTAGUE,	)	
	)	
Plaintiff,	)	**Civil Action No.**
vs.	)	**CV-02-S-0530-S**
ASPLUNDH TREE EXPERT CO.,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION

(Filed Mar. 27, 2003)

Plaintiff, Anthony A. Montague, claims that his former employer, Asplundh Tree Expert Co., terminated his employment because of his race (African American) and in retaliation for his opposition to discrimination in the workplace, in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*, as well as 42 U.S.C. § 1981. The case presently is before the court on three motions filed by defendant: a motion for summary judgment (doc. no. 37); a motion to strike the declaration of Melvin Whitman (doc. no. 49); and a motion to file a reply brief (doc. no. 51).

Federal Rule of Civil Procedure 56(c) provides, in part, that summary judgment not only is proper, but also that it "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Thus, "the plain language of Rule 56(c)

mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S. Ct. 2548, 2553, 91 L. Ed. 2d 265 (1986).

> In making this determination, the court must review all evidence and make all reasonable inferences in favor of the party opposing summary judgment.
>
> The mere existence of some factual dispute will not defeat summary judgment unless that factual dispute is material to an issue affecting the outcome of the case. The relevant rules of substantive law dictate the materiality of a disputed fact. A genuine issue of material fact does not exist unless there is sufficient evidence favoring the nonmoving party for a reasonable jury to return a verdict in its favor.

Chapman v. AI Transport, 229 F.3d 1012, 1023 (11th Cir. 2000) (en banc) (quoting *Haves v. City of Miami,* 52 F.3d 918, 921 (11th Cir. 1995)); *see also United States v. Four Parcels of Real Property,* 941 F.2d 1428, 1437 (11th Cir. 1991) (en banc).

Upon consideration of the pleadings, evidentiary submissions, and briefs, the court concludes that defendant's motion for summary judgment is due to be granted, and, the motions to strike the declaration of Melvin Whitman and to file a reply brief should be denied as moot.

I. SUMMARY OF FACTS

A. Defendant's Organizational Hierarchy

Defendant "provides a variety of services to the electric utility industry, primarily clearing trees, brush, and undergrowth from electrical power lines."[1] These tasks are performed by "crews" of two to six workers, with each being supervised by a "Crew Foreman." The Crew Foreman is supervised, in turn, by a "General Foreman." The General Foreman reports to a "Supervisor." Additionally, defendant sometimes employs an intermediate-level supervisor called a "Coordinator," who is ranked between Crew Foreman and General Foremen.[2] Coordinators usually supervise several crews and perform administrative and logistical functions, such as payroll, invoicing, and supply.[3] Defendant's Huntsville division currently employs Randy Parham as Supervisor (Caucasian male), Troy Rice as General Foreman (Caucasian male), and Marty Rowell (Caucasian Male) and Al Gilbert (African American male) as Coordinators.[4]

B. Plaintiff's Employment History With Defendant

Plaintiff was hired by defendant on or about May 5, 1991, to work as a crew member in the Huntsville, Alabama

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[1] Defendant's brief, at 2-3.

[2] *Id.*, Stated differently, the organizational hierarchy from top to bottom is as follows: Supervisor; General Foreman; Coordinator; Crew Foreman; and crew members.

[3] Defendant's evidentiary submissions, Montague deposition, at 44-45.

[4] Defendant's brief, at 3.

area.[5] Plaintiff received numerous promotions during the following years, and eventually was promoted to Crew Foreman on a date that he could not recall.[6] In 1997, defendant created a Coordinator position in Huntsville, and plaintiff was selected to fill the vacancy.[7] Two years after the promotion, defendant lost half of its contract with its major client, Huntsville Utilities. As a result, plaintiff's Coordinator position was eliminated and he was demoted to his previous position of Crew Foreman.[8] Plaintiff does not allege that this demotion was motivated by either a racially discriminatory or retaliatory animus.[9]

In the summer of 2000, defendant regained some of its lost business with Huntsville Utilities, and defendant consequently required two new Coordinators. Plaintiff and Lonnie Bridges (Caucasian male) were interviewed and selected to fill the positions.[10] Bridges later was voluntarily demoted to a Crew Foreman position, and Marty Rowell (Caucasian male) was promoted to the Coordinator slot vacated by Bridges.[11]

During his second stint as a Coordinator, plaintiff worked closely with Rowell and three employees of Huntsville Utilities – Supervisor Jeff Jordan (Caucasian male)

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[5] Defendant's evidentiary submissions, Montague deposition, at 28.

[6] *Id.*, at 38-39.

[7] *Id.*, at 44.

[8] *Id.*, at 47-48.

[9] *Id.*, at 48.

[10] *Id.*, at 21-22.

[11] Defendant's brief, at 7; Defendant's evidentiary submissions, Montague deposition, at 52.

and two Coordinators, Melvin Whitman and Charlie Davis (both African American males).[12] These persons assigned jobs to defendant, and plaintiff and Rowell ensured that the assigned work was performed properly by defendant's work crews. Plaintiff performed this job throughout the remainder of his employment with defendant.

No complaints regarding plaintiff's performance of his job duties and responsibilities were ever lodged by anyone in or outside the company. In fact, during April of 2001, plaintiff was recruited by defendant to fill a General Foreman position in Atlanta, Georgia.[13] Plaintiff declined to interview for the position, however, because he had no desire to relocate.[14]

C. Plaintiff's Opposition to Racial Harassment and Discrimination in the Workplace

Plaintiff testified during deposition that, throughout his employment with defendant, he frequently voiced opposition to racially-offensive behavior and perceived harassment and discrimination in the workplace.[15] Plaintiff's testimony regarding his complaints is largely vague and nonspecific, however, and it cannot readily be distilled into discrete episodes.

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[12] Apparently, Huntsville Utilities uses some of the same job titles as defendant.

[13] Defendant's evidentiary submissions, Montague deposition, at 197-200.

[14] *Id.*, at 197-198. More specifically, plaintiff told management that "I ain't going to no Atlanta."

[15] *See* defendant's evidentiary submissions, Montague deposition, at 33, 57-59, 63-69, 74-75, and 90-91.

D. Circumstances Surrounding Plaintiff's Termination

1. Rumors of sexual harassment

On Friday, April 6, 2002, plaintiff confronted his fellow Coordinator, Marty Rowell, regarding a rumor circulating among defendant's employees that several individuals (Rowell, Rice, and Jordan) were trying to persuade one of defendant's female Crew Forepersons, Amanda Brown, to accuse Melvin Whitman (a Coordinator for Huntsville Utilities) of sexual harassment. Rowell denied knowledge of such a scheme.[16]

The following Monday morning, Rowell relayed plaintiff's accusation to Rice and Jordan.[17] That same morning, Jordan called a meeting at Huntsville Utilities to discuss the rumors.[18] Jordan, Whitman, Rice, Rowell, and plaintiff attended.[19]

Jordan opened the meeting by restating the substance of the rumor.[20] Rice and Jordan then denied that the rumor was true.[21] Whitman responded by saying that he did not believe Jordan and Rice, in part because Rowell and his work crew were taking notes regarding what transpired at their work sites, presumably for the purpose

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[16] *Id.*, at 103-05.

[17] *Id.*, Rowell deposition, at 14.

[18] *Id.*, Montague deposition, at 105, 108.

[19] *Id.*, at 107.

[20] *Id.*, at 109.

[21] Defendant's evidentiary submissions, Montague deposition, at 109-10, 116.

of gathering evidence against him (Whitman).[22] Plaintiff then voiced his opinion by saying to Rowell:

> If you're going to tell your crew to do this and do this, that's going to make Melvin [Whitman] think that you're being sneaky and underhanded behind his back. And I said, Melvin, if you go to the crew that's going to make Marty [Rowell] think that you're being sneaky and underhanded. I said, y'all just need to come together, you know, come together like men and just talk and you wouldn't have this problem. And that's the only thing I said. . . . "[23]

Jordan then commented that plaintiff's argument made a "good point,"[24] and asked each person whether there were any other issues they needed to "air out." After each person responded negatively, Jordan adjourned the meeting.[25]

2. Plaintiff's argument with his General Foreman

After the meeting, Rice directed Rowell and plaintiff to meet him by his truck in the parking lot.[26] Rice then upbraided plaintiff for his comments to Rowell, saying "don't you ever go into a meeting against [defendant]."[27]

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[22] *Id.*, at 110-12.

[23] *Id.*, at 114.

[24] *Id.*, at 114.

[25] *Id.*, at 115.

[26] *Id.*, at 118.

[27] Defendant's evidentiary submissions, Montague deposition, at 119.

Plaintiff protested that he had not done anything wrong, and adding:

> you [Troy Rice] can't just talk to me any kind of way because I am thirty-one years old and I don't talk to my kids like that and you're not going to talk to me like that. And I said, you or anybody else in this company ain't going to dictate what I say or cannot say.[28]

The discussion quickly degenerated from an argument into a shouting match, which led Rice to conclude that plaintiff was too upset to work, and he suspended plaintiff's employment for the remainder of the day.[29]

As plaintif entered his company-owned truck to depart, he overheard Rice shout to Rowell, "I did all I can do for him [plaintiff], I'm through with him."[30] Plaintiff took offense, exited his truck, and resumed his argument with Rice, telling him "you ain't done nothing for me," and mentioning several incidents in which plaintiff felt that Rice had not properly supported him.[31] Rice responded by telling plaintiff "you're suspended indefinitely, give me your [truck] keys."[32] Plaintiff then removed the key to the company truck from his chain and "pitched" it to Rice.[33] "The key hit [Rice's] chest and he caught the key just like

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[28] *Id.*, Montague deposition, at 120.

[29] *Id.*, at 119, 124.

[30] *Id.*, at 121.

[31] *Id.*, at 121-22.

[32] *Id.*, at 122.

[33] Defendant's evidentiary submissions, Montague deposition, at 122.

that (indicating)."[34] Rice and plaintiff then continued to bicker.

> [H]e [Rice] didn't cuss, that I recall, and I didn't cuss, I know. I know I didn't cuss him. But we was yelling and he kept hollering you need to quiet down, you work for Huntsville Utilities through contract. And I said, you need to quiet down too. I said you can't just yell and scream at me, you know. And then I told him, I said, that's all right, I'm going to get you for all this racism, you and the company once and for all. He said, oh, you can go get the NAACP and get your lawyer or whatever you want, I don't care.[35]

Plaintiff then demanded that Rice drive him home, because he no longer had transportation.[36]

During the trip to plaintiff's residence, except for a few quiet intervals, Rice and plaintiff "yelled and screamed all the way to the house."[37] Plaintiff continued to protest Rice's behavior, saying "you can't keep yelling at me, you need to stop, I'm the Supervisor, I'm a man."[38] Rice finally stopped shouting "after he seen I wasn't going to stop yelling."[39] Plaintiff then accused Rice and defendant's management of offering him the Atlanta promotion to "get

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[34] *Id.*, at 122-23.

[35] *Id.*, at 123-24.

[36] *Id.*, at 124.

[37] *Id.*

[38] *Id.*

[39] Defendant's evidentiary submissions, Montague deposition, at 125.

rid of [him], instead of dealing with the issues."[40] Plaintiff's vague deposition testimony does not specify the "issues" that he wanted defendant to address, although the context suggests that plaintiff was referring to his perception that defendant discriminated against African Americans (or perhaps, given the reason for the meeting at Huntsville Utilities, women).[41]

About halfway through the trip to plaintiff's residence, plaintiff realized that he had left his house key in his company-owned truck.[42] As a result, Rice turned around and drove plaintiff back to his assigned vehicle to retrieve the key.[43]

On the way back to the truck, Rice asked plaintiff if he wanted to meet with Steve Bostock (defendant's Vice President) and Randy Parham (Supervisor) regarding his concerns.[44] Plaintiff said that he did, and Rice agreed to arrange a meeting the following day.[45] Upon arrival at plaintiff's truck, Rice returned plaintiff's ignition key and told him to drive home.[46] Rice said, "we both need to cool down, I'll see you in the morning"[47] Plaintiff encountered

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[40] *Id.*, at 126.

[41] *Id.*, at 126-27.

[42] *Id.*, at 133.

[43] *Id.*

[44] *Id.*, at 129.

[45] Defendant's evidentiary submissions, Montague deposition, at 129.

[46] *Id.*

[47] *Id.*

Whitman on his way home, and recounted his argument with Rice.[48]

3. Defendant's decision to terminate plaintiff's employment

After leaving plaintiff in the Huntsville Utilities parking lot, Rice reported the incident to Supervisor Randy Parham.[49] Parham instructed Rice to telephone Kerry Miller, defendant's Compliance and Equipment Supervisor.[50] He did so, and recounted the incident.[51] That same day, Miller met with Parham to discuss both the meeting that had occurred at Huntsville Utilities and the subsequent argument between Rice and plaintiff.[52] Miller later discussed both matters with defendant's General Counsel.[53]

Following his investigation, Miller concluded that plaintiff's statements during the meeting at Huntsville Utilities and his later behavior toward Rice were insubordinate.[54] Insubordination is described in defendant's employee handbook as an offense warranting termination,

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[48] *Id.*, at 129-30.

[49] *Id.*, Rice deposition, at 53.

[50] *Id.*, at 54; *see* Miller affidavit.

[51] At some unspecified point in time, Rice faxed Miller statements from himself, Rowell, and Brown, detailing their knowledge of the incidents in question. The statements are dated April 9, 11, and 12, 2003. Defendant's brief, at 16; Miller deposition, at Plaintiff's Exhibits 1-3 (employee statements).

[52] Defendant's brief, at 17; Miller deposition, at 46.

[53] Defendant's evidentiary submissions, Miller deposition, at 54.

[54] *Id.*, at 41.

and Miller instructed Rice to terminate plaintiff's employment, effective April 12, 2001.[55]

4. Plaintiff's request for re-hire

Plaintiff mailed a letter to defendant's EEO Officer on May 3, 2001, requesting that he be re-hired.[56] His request was denied on May 22, 2001, however, because former employees terminated for insubordination were not eligible for rehire under defendant's written policies.[57]

5. Plaintiff's EEOC charge and legal action

Plaintiff filed a charge with the Equal Employment Opportunity Commission on July 2, 2001, complaining of race discrimination and retaliation.[58] The EEOC issued a right-to-sue letter on December 6, 2001,[59] and plaintiff commenced this action on February 28, 2002.[60]

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[55] *Id.*, at 52.

[56] *Id.*, Montague deposition, at Exhibit 7 (Montague letter May 3, 2001).

[57] *Id.*, at Exhibit 10 (Asplundh letter May 22, 2001). Defendant's written rehire policy states that "no one who has been terminated from Asplundh Tree Expert Co. or any subsidiary of Asplundh will be eligible for rehire." *Id.* at Exhibit 9 (Bostock letter Jan. 5, 1998).

[58] *Id.*, at Exhibit 11 (Montague EEOC charge July 5, 2001).

[59] Defendant's evidentiary submissions, Montague deposition, at Exhibit 12 (EEOC Right-to-Sue letter Dec. 6, 2001).

[60] Complaint (doc. no. 1).

II. DISCUSSION

A. Racially-Discriminatory Termination[61]

Plaintiff does not contend that he has direct evidence of a racially-discriminatory animus. His claims accordingly must be evaluated under the analytical framework announced in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S. Ct 1817, 36 L. Ed. 2d 668 (1973), and elaborated in *Texas Department of Community Affairs v. Burdine,* 450 U.S.248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981). *See also St. Mary's Honor Center v. Hicks,* 509 U.S. 502, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993). Under that now familiar framework, plaintiff bears the initial burden of establishing a prima facie case of discrimination. *McDonnell Douglas,* 411 U.S. at 802, 93 S. Ct. at 1824; *see also Burdine,* 450 U.S. at 253-54 & n.6, 101 S. Ct. at 1093-94 & n.6. "The effect of the presumption of discrimination created by establishment of the prima facie case is to shift to the employer the burden of producing legitimate, nondiscriminatory reasons for the challenged employment action." *Combs v. Plantation Patterns,* 106 F.3d 1519, 1528 (11th Cir. 1997) (citing *McDonnell Douglas,* 411 U.S. at 802, 93 S. Ct. at 1824; *Burdine,* 450 U.S. at 254, 101 S. Ct. at 1094). To rebut the presumption of intentional discrimination raised by a plaintiff's demonstration of a prima facie case, "the defendant must clearly set forth,

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[61] Plaintiff's Title VII and § 1981 race discrimination claims require the same proof to show liability. "Thus, the [c]ourt will address [plaintiff's] Title VII discrimination claim with the express understanding that the analysis applies to [his § 1981] claim as well." *Holiness v. Moore-Handley, Inc.*, 114 F. Supp. 2d 1176, 1181 (N.D. Ala. 1999); citing *Standard v. A.B.E.L. Services, Inc.*, 161 F.3d 1318, 1330 (11th Cir. 1998).

through the introduction of admissible evidence, the reasons for the [contested employment decision]." *Burdine,* 450 U.S. at 255, 101 S. Ct. at 1094. If a defendant carries its burden of producing "admissible evidence which would allow the trier of fact rationally to conclude that the employment decision had not been motivated by [a] discriminatory animus," *Burdine,* 450 U.S. at 257, 101 S. Ct. at 1096, the presumption of discrimination created by the prima facie case "drops from the case," and "the factual inquiry proceeds to a new level of specificity." *Id.* at 255 & n.10, 101 S. Ct. at 1094-95 & n.10. The burden then shifts to the plaintiff to "come forward with evidence, including the previously produced evidence establishing the prima facie case, sufficient to permit a reasonable factfinder to conclude that the reasons given by the employer were not the real reasons for the adverse employment decision," but merely pretext for intentional discrimination. *Combs,* 106 F.3d at 1528 (citing *Burdine,* 450 U.S. at 256, 101 S. Ct. at 1095; *McDonnell Douglas,* 411 U.S. at 804, 93 S. Ct. at 1825). *Cf. Reeves v. Sanderson Plumbing Products, Inc.,* 530 U.S. 133, 148, 120 S. Ct. 2097, 2109, 147 L. Ed. 2d 105 (2000) (holding that "a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated"). If a plaintiff does so, then he "is entitled to survive summary judgment." *Combs,* 106 F.3d at 1529. "The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Reeves,* 530 U.S. at 143, 120 S. Ct. at 2106.

1. Prima facie case

Plaintiff claims that defendant terminated his employment because he is an African American. In discharge situations, courts generally require a plaintiff to demonstrate that: (1) he was a member of a class of persons protected by the statute; (2) he was qualified for the position from which he was discharged; (3) he nevertheless was terminated; and (4) following his discharge, the defendant either replaced plaintiff with someone outside the protected class, or retained other employees who were not within the protected class, and, who possessed comparable or lesser qualifications. *See, e.g., Jones v. Bessemer Carraway Medical Center,* 137 F.3d 1306, 1311 n.6 (11th Cir. 1998); *Nix v. WLCY Radio/Rahall Communications,* 738 F.2d 1181, 1185 (11th Cir. 1984); *Whiting v. Jackson State University,* 616 F.2d 116, 121 (5th Cir. 1980). Further, since plaintiff also is challenging defendant's application of discipline for violation of work rules, he must show either: "(a) that he did not violate the work rule, or (b) that he engaged in misconduct similar to that of a person outside the protected class, and that the disciplinary measures enforced against him were more severe than those enforced against other persons who have engaged in similar misconduct." *Jones v. Gerwens,* 874 F.2d 1534, 1540 (11th Cir. 1989) (citation omitted); *see also Jones v. Bessemer Carraway,* 137 F.3d at 1311 n.6 (questioning and elaborating on the prima facie case set forth in *Jones v. Gerwens*).

Here, plaintiff cannot demonstrate a prima facie case. First, it is readily apparent that plaintiff violated a work rule. While defendant's employee discipline policy apparently does not define what behavior constitutes insubordination, *Black's Law Dictionary* defines the term as: "1. A

willful disregard of an employer's instructions, esp. behavior that gives the employer cause to terminate a worker's employment. 2. An act of disobedience to proper authority; esp. a refusal to obey an order that a superior officer is authorized to give." *Id.* at 802 (7th ed. 1999) (Bryan A. Garner, ed.).[62] Plaintiff's own deposition testimony makes it abundantly clear that his behavior during the argument with Rice meets that definition – *e.g.,* plaintiff shouted at Rice for an extended period of time, despite Rice's demands that plaintiff stop shouting. Plaintiff also threw his truck's ignition key at Rice, striking him in the chest. *See* § I(D)(2) *supra.* Moreover, plaintiff's brief identifies no similarly-situated employee outside his protected class who engaged in similar misconduct, but received less severe punishment.[63]

2. Defendant's stated reason for plaintiff's termination and pretext

Even if this court were to overlook plaintiff's failure to demonstrate a prima facie case, defendant proffers plaintiff's insubordinate behavior as the nondiscriminatory reason for his termination. Plaintiff attempts to prove that basis is not the real reason for his discharge with the following series of arguments:

---

[62] *See also Webster's II New Riverside University Dictionary* 633 (1994) (defining "insubordinate" as "[n]ot submissive to authority" or "disobedient").

[63] Defendant, on the other hand, points out that it terminated a Caucasian Crew Foreman named David Bridges in January of 2001 for insubordination after that individual cursed and threatened Rice and threw his keys at him. *See* defendant's evidentiary submissions, Rice Affidavit ¶ 8.

> There are five material points from which a reasonable jury may well conclude that [defendant] did not act in good faith [in terminating plaintiff's employment]: (1) Mr. Rice initiated the confrontation; (2) Mr. Rice's objection to [plaintiff's] conduct at the meeting was not reasonable; (3) [plaintiff] had spoken up on behalf of African-American employees, including very recently; (4) Mr. Rice was pushing [plaintiff] to leave Alabama in order to take a promotion in Atlanta, but [plaintiff] declined; and (5) [plaintiff] was fired without ever having an opportunity to reply to Mr. Rice's accusation.[64]

These arguments, while perhaps engendering some degree of sympathy for plaintiff, do nothing to prove pretext, because none address the core fact – *plaintiff clearly was insubordinate to his supervisor.* None serve to relieve plaintiff from the consequences of his actions, nor do they compel defendant to tolerate such behavior. This court concludes that no reasonable factfinder would reasonably conclude, on the basis of plaintiff's arguments, that defendant's stated reason for his termination is pretextual. Accordingly, plaintiff's race discrimination claim is due to be dismissed.

B. Retaliation

Plaintiff alternatively argues that defendant terminated his employment in retaliation for his opposition to discrimination in the workplace. "Retaliation is a separate

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[64] Plaintiff's brief, at 5.

violation of Title VII."[65] *Gupta v. Florida Board of Regents*, 212 F.3d 571, 586 (11th Cir. 2000). A plaintiff generally must prove three elements to establish a prima facie case of retaliation: (1) he engaged in statutorily protected expression; (2) he suffered an adverse employment action; and (3) there was a causal linkage between the protected conduct and the adverse employment action. *See, e.g., Bass v. Board of County Commissioners*, 256 F.3d 1095, 1117 (11th Cir. 2001); *Johnson v. Booker T. Washington Broadcasting Service, Inc.*, 234 F.3d 501, 507 (11th Cir. 2000); *Gupta*, 212 F.3d at 587; *Wideman v. Wal-Mart Stores, Inc.*, 141 F.3d 1453, 1455 (11th Cir. 1998); *Little v. United Technologies*, 103 F.3d 956, 959 (11th Cir. 1997); *Meeks v. Computer Associates International*, 15 F.3d 1013, 1021 (11th Cir. 1994); *Goldsmith v. City of Atmore*, 996 F.2d 1155, 1163 (11th Cir. 1993).

> Once plaintiff establishes a prima facie case [of retaliation] by proving only that the protected activity and the negative employment action are not completely unrelated, the burden shifts to the defendant to proffer a legitimate reason for the adverse action. . . . The burden then shifts back to the plaintiff to prove by a preponderance of the evidence that the "legitimate" reason is merely pretext for prohibited, retaliatory conduct.

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[65] The following analysis is equally applicable to that portion of plaintiff's retaliation claim based upon 42 U.S.C. § 1981. *See Sullivan v. National Railroad Passenger Corp.*, 170 F.3d 1056, 1058-61 (11th Cir. 1999) (treating the sufficiency of the evidence to sustain a retaliation claim brought under Title VII and§ 1981 with a single analysis); *Moss v. W & A Cleaners*, 111 F. Supp. 2d 1181 (M.D. Ala. 2000); *Holiness v. Moore-Handley, Inc.*, 114 F. Supp. 1176, 1185 (N.D. Ala. 1999).

Sierminski v. Transouth Financial Corporation, 216 F.3d 945, 950 (11th Cir. 2000) (citations omitted).

Even assuming that plaintiff can demonstrate a prima facie case, his retaliation claim still is due to be dismissed for the same reasons previously discussed: defendant's stated reason for plaintiff's termination has not been shown to be pretextual.

III. CONCLUSION

Defendant's motions to file a reply brief and to strike the declaration of Melvin Whitman are denied as moot. Defendant's motion for summary judgment is granted. An order consistent with this memorandum opinion shall be issued contemporaneously herewith.

DONE this 27th day of March, 2003.

/s/ Lynwood Smith
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

ANTHONY A. MONTAGUE,	)	
Plaintiff,	)	
	)	**Civil Action No.**
vs.	)	**CV-02-S-0530-NE**
ASPLUNDH TREE EXPERT CO.,	)	
	)	
Defendant.	)	

ORDER

(Filed Mar. 27, 2003)

In accordance with the memorandum opinion entered contemporaneously herewith, defendant's motion for summary judgment is granted, and all of plaintiff's claims are dismissed with prejudice. Defendant's motions to file a reply brief, and to strike the declaration of Melvin Whitman, are denied as moot. Costs are taxed to plaintiff. The clerk is directed to close this file.

DONE this 27th day of March, 2003.

/s/ C. Lynwood Smith, Jr.
United States District Judge

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 03-12274-EE

ANTHONY A. MONTAGUE,

Plaintiff-Appellant,

versus

ASPLUNDH TREE EXPERT CO.,

Defendant-Appellee.

On Appeal from the United States District Court for the Northern Distirct of Alabama

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ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

(Opinoin ___, 11th Cir., 19__, ___ F.2d ___).

(Filed Dec. 11, 2003)

Before: BIRCH, BARKETT and HULL, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate

Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ [Illegible]
UNITED STATES CIRCUIT JUDGE

(2)

FEB 2 6 2004
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No. 03-1077

In The Supreme Court of the United States

COREY THOMAS,

Petitioner,

v.

WAL-MART STORES, INC.,

Respondent.

ANTHONY A. MONTAGUE,

Petitioner,

v.

ASPLUNDH TREE EXPERT CO.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

WAL-MART'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether, in the absence of any split of authority among the courts of appeals, this Court should grant certiorari to jointly review these two highly fact-intensive claims of race discrimination to determine whether the court of appeals correctly held that the respective Petitioners failed to make a submissible jury case.

RULE 29.6 STATEMENT

Respondent is Wal-Mart Stores, Inc. It has no parent corporation, and no publicly-held company owns 10% or more of its stock.

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WAL-MART'S BRIEF IN OPPOSITION

Respondent Wal-Mart Stores, Inc. ("Wal-Mart") respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the Eleventh Circuit's unpublished *per curiam* opinions in the cases of *Thomas v. Wal-Mart* and *Montague v. Asplundh Tree Experts*. As discussed below, Wal-Mart does not believe that the judgments in these two separate cases can be challenged in a single petition. The cases are different in many material respects and do not present the "identical or closely-related questions" required by Rule 12.4. Should the Court conclude nevertheless that Rule 12.4 has been properly invoked, Wal-Mart opposes a grant of review for the reasons stated below, as well as for those set forth in Respondent Asplundh's Brief in Opposition.

STATEMENT OF THE CASE

Petitioners' Statement of Case omits or understates facts material to this Court's consideration of the issues. Some of the material facts discussed in the opinion of the court of appeals (Pet. App. 2-10) that the Petitioners neglect to address are briefly highlighted below.

During the eighteen months that Petitioner Corey Thomas worked for Wal-Mart, he was promoted several times, with his final position being an assistant manager. In the spring of 2000, Wal-Mart held a "grass roots" meeting in each of its stores to allow employees to voice concerns about management. Several employees complained that Thomas regularly injected race into employee discussions, was not observed in the store, did not properly supervise employees because he spent hours playing cards

with female employees in the manager's office, and did not perform substantial work as had previous night assistant managers. In violation of a company policy designed to protect confidentiality, Thomas discussed with an employee what was said at the "grass roots" meeting and why that employee did not stand up for him. Soon after the meeting, Thomas had an in-store altercation with one of his subordinates. The subordinate advised the store manager that he was going to call the police because he felt Thomas had threatened him.

Thomas' supervisors at Wal-Mart conducted an investigation of his conduct that revealed numerous other complaints that Thomas behaved inappropriately and violated company policy. The complaints generally involved sexual misconduct alleged to violate Wal-Mart's anti-harassment policies. After the investigation, Wal-Mart fired Thomas, advising him that the reason for his termination was an accumulation of reported violations involving sexual harassment and inappropriate conduct.

Thomas filed a lawsuit in the United States District Court for the Northern District of Alabama alleging that he was fired without good cause and that the reasons given for his termination were a pretext for intentional discrimination on the basis of race. He also alleged that he was terminated in retaliation for complaints he made about race discrimination. On March 26, 2003, the trial court granted summary judgment in favor of Wal-Mart, concluding, among other things, that Thomas did not offer any evidence from which a reasonable juror might infer that the investigation was conducted in bad faith, or that Wal-Mart knew that the allegations were untrue. On October 30, 2003, the Eleventh Circuit affirmed, holding that Thomas did not establish a *prima facie* case of racial

discrimination and that he did not introduce sufficient evidence to raise a genuine issue of material fact regarding whether Wal-Mart's proffered legitimate reasons for its decision were actually a pretext for racial discrimination or retaliation.

REASONS FOR DENYING THE PETITION

The cases at issue here are garden-variety employment disputes where the Eleventh Circuit applied settled law to the particular facts presented. The Petition raises no significant questions of federal law. No split in the circuits is discussed or exists. The Petitioners did not properly preserve the questions presented. The two judgments do not present "closely related questions" and so should not be challenged in a single petition under Supreme Court Rule 12.4. For these reasons, the Petition should be denied.

I. THE JUDGMENTS DO NOT PRESENT CLOSELY-RELATED QUESTIONS.

Petitioners seek review of two separate judgments of the Eleventh Circuit, one in favor of Wal-Mart and one in favor of Asplundh Tree Expert Co. There was no coordination of the cases in either the district court or court of appeals. Each case is highly fact intensive – as revealed by the detailed recitation found in the Petition's nineteen-page "Statement of the Cases." The cases involve different employers, different employee conduct, different company policies, and different rationales for the employment decision at issue. Whether either Petitioner could make a *prima facie* case of discrimination or prove that the

employer's reason for a job action was actually a pretext for racial discrimination depends on the particular facts of each case. No generalizations can be made.

The legal reasoning of the court of appeals was also different in the two cases. In *Thomas*, the Eleventh Circuit made alternative holdings, ruling both that the plaintiff failed to make a *prima facie* case and that, even if he had, he failed to show that Wal-Mart's proffered reason for termination was a pretext for discrimination or retaliation. In *Montague*, the Eleventh Circuit ruled only the plaintiff's evidence failed to create an issue of fact regarding pretext. In addition, in *Thomas*, the court of appeals did not discuss *Desert Palace v. Costa*, 123 S.Ct. 2148 (2003), presumably because the legal doctrine interpreted in *Desert Palace* was not raised by Thomas in the court of appeals until his reply brief. Thus, in *Thomas* the court of appeals never discussed any issues related to the Petition's second Question Presented.

In short, the facts underlying the two cases joined in the Petition are different, as is the legal reasoning behind the judgments. In the later *Thomas* decision, the court of appeals also did not rely on (or even mention) its decision in *Montague*. The two judgments thus do not involve "identical or closely related questions" under Rule 12.4 and should not have been joined. *See Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 540-541 (1994) (allowing combined petition where two judgments were against the same employer, where the same legal question was presented, and where the second opinion expressly relied on the holding of the first opinion); *Rodriguez v. Compass Shipping*, 451 U.S. 596, 598 (1981) (three cases by longshoremen against their employers combined in a single petition where same legal question was presented and

where cases were decided by court of appeals on the same day using the same legal reasoning). The Petition should therefore be denied.

II. THE PETITION MISSTATES THE REASONING OF THE COURT OF APPEALS AND SEEKS REVIEW ONLY OF THE APPLICATION OF A SETTLED LEGAL STANDARD TO UNIQUE FACTS.

In the first Question Presented, the Petition contends that the court of appeals improperly required "a closely similar comparator as the sole method for avoiding summary disposition" in any employment discrimination case. This "Question" is not an accurate description of the basis for the Eleventh Circuit's rulings, and, in any event, is not worthy of this Court's review.

The Eleventh Circuit did not hold that proof of a "closely similar comparator" is the "sole method for avoiding summary disposition" in a race discrimination case. The court of appeals expressly acknowledged that "[d]emonstrating a prima facie case is not onerous; it requires only that the plaintiff establish facts adequate to permit an inference of discrimination." (Pet. App. 40) (quotation marks omitted). Thus, the Petition's suggestion that the court of appeals ignored the statement in *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 510 (2002), that the *prima facie* case "relates to the employee's burden of presenting evidence that raises an inference of discrimination" (Pet. 22), is contrary to the text of the opinion of the court of appeals.

The court of appeals expressly recognized that there were different ways under *McDonnell Douglas v. Green*,

411 U.S. 792, 802 (1973), for plaintiffs to make a *prima facie* case. The methods listed in the opinions include proof that each plaintiff suffered "disparate treatment because of membership in the protected class" (Pet. App. 40), that the plaintiff was "replaced by a person outside the protected class" (Pet. App. 40, 11), or that the employer "treated similarly situated employees outside of his classification more favorably" (Pet. App. 11). Nor is proof of "a closely similar comparator" the sole method for the plaintiff to prove that the legitimate reason advanced by the employer for the termination was mere pretext for discrimination. The court of appeals stated in *Montague* that proof that "similarly situated non-minority employees were disciplined differently based on similar conduct" is only an "*example*" of the kind of circumstantial evidence that plaintiff can use to "persuade the fact finder that [the employer's] reason for terminating him is not worthy of belief." (Pet. App. 41 n.1.) (emphasis added). In the *Thomas* case, neither the court of appeals (Pet. App. 12) nor the district court (Pet. App. 30-31) mentioned any requirement that pretext be proved only by evidence of a "closely similar comparator." Petitioners have misstated the ruling of the court of appeals and the Eleventh Circuit's approach to these issues is fully consistent with *McDonnell Douglas* and its progeny.

To be sure, the court of appeals did review as part of its analysis whether a similarly situated non-minority had been treated differently by Wal-Mart. This analysis is appropriate under this Court's teachings, *see Texas Dep't of Comm. Affairs v. Burdine*, 450 U.S. 248, 258 (1981) ("*McDonnell Douglas* teaches that it is the plaintiff's task to demonstrate that similarly situated employees were not treated equally"), is consistent with the decisions of other

circuits, *e.g. Haywood v. Lucent Technologies*, 323 F.3d 524, 530 (7th Cir. 2003); *Aragon v. Republic Silver State Disp.*, 292 F.3d 654, 658 (9th Cir. 2002), and exactly what Petitioners asked the court of appeals to do. For example, Thomas' opening brief in the Eleventh Circuit (a) stated that "[a] Title VII plaintiff may make out a prima facie case by a showing of disparate treatment among similarly placed employees" (p. 26), (b) admitted that a plaintiff needs to prove that his "former position was filled by someone outside his protected class, or a similarly situated employee was treated more favorably" (p. 28), and (c) argued that he had made a submissible case because "white Assistant Managers whose performance was satisfactory are similarly situated" (p. 26). Because Thomas asked the court of appeals to consider these issues, he cannot now complain that it did so. The issue has thus been waived.

Despite Petitioners' efforts to obfuscate the issue, the court of appeals did not depart from this Court's decisions but instead engaged in the proper (and routine) application of the test articulated in *McDonnell Douglas*, 411 U.S. at 802-804, and explained further in cases such as *Reeves v. Sanderson Plumbing Products*, 530 U.S. 133, 142 (2000), and *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506-507 (1993), to determine whether a plaintiff is entitled to a jury trial. The Petition thus seeks no more than review of the court of appeals' application of settled law to the peculiar facts presented. Indeed, the Petition does not point to a single decision of any court of appeals that conflicts with that of the Eleventh Circuit's unpublished *per curiam* decisions in these cases. The Petition should be denied.

III. *DESERT PALACE* DID NOT OVERRULE *MCDONNELL DOUGLAS*.

Petitioner's second question presented has as its unstated premise that the decision in *Desert Palace v. Costa*, 123 S.Ct. 2148 (2003), *sub silentio* overruled *McDonnell Douglas*'s established holding that after an employer produces evidence that the employee was terminated for a legitimate, nondiscriminatory reason, it falls to the plaintiff to produce evidence that the legitimate reason was a pretext for racial discrimination. *Desert Palace* did not affect the standard rules announced in *McDonnell Douglas*. Moreover, the *Desert Palace* issues were not preserved for review, and, as with the first Question Presented, there is no division of authority on this subject among the courts of appeals.

The court of appeals' opinions in these cases held that if an employer proffers a legitimate, non-discriminatory reason for the adverse employment action, the plaintiff must demonstrate that the employer's proffered reason is a pretext for discrimination. (Pet. App. 11, 40). This approach is fully consistent with this Court's direction from *McDonnell Douglas*, where the Court held that once the employer offers a legitimate, nondiscriminatory reason for the job action, the plaintiff must "be afforded a fair opportunity to show that [the] stated reason for [the] rejection was in fact pretext." 411 U.S. at 804; *see also Burdine*, 450 U.S. at 252-253. Contrary to the suggestion in the Petition, the court of appeals did not shift the "burden of proof" to the plaintiff on this subject; rather, it was only the burden of production that shifted. (Pet. App. 40).

Desert Palace did not even mention *McDonnell Douglas*, let alone overrule the well-established burden-shifting

approach established by that case. This Court in fact reaffirmed *McDonnell Douglas* after *Desert Palace* in *Raytheon Company v. Hernandez*, 124 S.Ct. 513, 517-518 & n.3 (2003). According to *Raytheon*, once the defendant provides "a legitimate, nondiscriminatory reason" for its employment action, the "only remaining question would be whether [plaintiff] could produce sufficient evidence from which a jury could conclude that [the] 'stated reason for respondent's rejection was in fact pretext.'" *Id.*; *see also id.* at 519. The Eleventh Circuit's decisions below are fully consistent with *Raytheon* and *McDonnell Douglas*.

Desert Palace has no application to the cases at issue in this Petition because *Desert Palace* applies only in so-called "mixed motive" cases. *Desert Palace*, 123 S.Ct. at 2153. "Mixed motive" cases are those where discrimination is shown to be a motivating factor in the job decision but the employer claims that the same job action would have been taken regardless. *Id.* at 2151. "Mixed motive" cases were described in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), and are different from "pretext" cases where the plaintiff argues under *McDonnell Douglas* that while the employer advanced a legitimate, non-discriminatory reason for the job action, the real reason for the decision was discrimination. *See, e.g. Hill v. Lockheed Martin Logistics*, 354 F.3d 277, 284-285 (4th Cir. 2004) (en banc) (explaining the differences between the two doctrines in a post-*Desert Palace* case).

Contrary to Petitioners' claims (Pet. 4, 26), these are not "mixed motive" cases. There was no evidence race was a motivating factor. Although the employers did raise the doctrine in their answers filed at the beginning of the case, the doctrine was not the basis for the summary judgment entered by the trial court or the judgment of the court of

appeals. Petitioners instead argued in the trial court and on appeal that their cases were governed by *McDonnell Douglas*'s burden-shifting approach and that they were entitled to a jury trial because they had "established a *prima facie* case" and that they were "fired based upon a pretext." (Brief of Petitioner Thomas in Opposition to Summary Judgment, pp. 5, 8). Petitioners waited until their reply brief in the court of appeals to raise the "mixed motive" theory and neither opinion of the court of appeals treated this as a "mixed motive" case. Because the doctrine has its roots in 1989's *Price Waterhouse* decision, the raising of the argument in a reply brief was insufficient to preserve the issue for review. *See Pruett v. Village News*, 2003 WL 22833376, *1 n.2 (8th Cir. 2003) (refusing to consider a *Desert Palace* argument because plaintiff "did not raise the issue that this is a 'mixed-motive' case until the filing of her supplemental brief"). Indeed, in the *Thomas* case the court of appeals did not address the impact of *Desert Palace* at all, demonstrating that Thomas should have raised the point sooner if he wished to preserve the point for review.

Desert Palace was decided last term. No division of authority exists among the circuits regarding how it should be interpreted in cases such as those at issue here. The Petition does not cite a single case disagreeing with the approach of the Eleventh Circuit and holding that *Desert Palace* altered the burden-shifting approach required by *McDonnell Douglas* for cases involving claims of "pretext." To the contrary, this Court and the courts of appeal continue to recognize that once the defendant presents evidence of a legitimate, nondiscriminatory reason for the job action, the plaintiff must produce evidence that the proffered reason is actually a pretext for

discrimination. *E.g.*, *Raytheon*, 124 S.Ct. at 517-519; *Estades-Negroni v. Associates Corp.*, 345 F.3d 25, 32 (1st Cir. 2003); *Hill*, 354 F.3d at 285. This case thus again seeks review of whether the court of appeals properly applied settled law to the particular facts of these two different cases.

CONCLUSION

For the reasons stated, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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February 26, 2004

(3)

Supreme Court, U.S.
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No. 03-1077

In The Supreme Court of the United States

COREY THOMAS,

Petitioner,

v.

WAL-MART STORES, INC.,

Respondent.

ANTHONY A. MONTAGUE,

Petitioner,

v.

ASPLUNDH TREE EXPERT CO.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF FOR RESPONDENT ASPLUNDH TREE EXPERT CO. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Eleventh Circuit correctly applied well-established employment discrimination case law in holding that Petitioner Anthony A. Montague failed to create a genuine issue of material fact as to Respondent Asplundh Tree Expert Company's decision to terminate his employment for insubordination?

PARTIES TO THE PROCEEDINGS BELOW AND CORPORATE DISCLOSURE STATEMENT[1]

The Petition for Writ of Certiorari seeks review of two unrelated opinions from the Eleventh Circuit Court of Appeals. Corey Thomas is the Petitioner in the first case and Wal-Mart Stores, Inc. is the Respondent. In the second case, Anthony A. Montague is the Petitioner and the Respondent is Asplundh Tree Expert Company ("Asplundh"). Asplundh was the corporate defendant in the District Court and the Appellee in the Eleventh Circuit in the case and appeal brought by Montague.

Asplundh Tree Expert Company has no parent company and no publicly held company owns ten percent or more of its stock.

[1] Respondent Asplundh Tree Expert Company submits this Opposition in response to the Petition for a Writ of Certiorari as it relates to Anthony Montague.

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OPINIONS BELOW

The Eleventh Circuit Court of Appeals' October 1, 2003, opinion in *Montague v. Asplundh Tree Expert Co.*, No. 03-12274, is unpublished (Pet. App. 36-43). On December 11, 2003, the Eleventh Circuit Court of Appeals denied petitioner Anthony A. Montague's Petition for Rehearing and for Rehearing En Banc (Pet. App. 64-65).

The District Court of the Northern District of Alabama, Northeastern Division, entered summary judgment in favor of Respondent Asplundh Tree Expert Company in an unpublished opinion on March 27, 2003 (Pet. App. 44-63).

JURISDICTIONAL BASIS

The Petition for Writ of Certiorari seeks review of two unrelated opinions from the Eleventh Circuit Court of Appeals. The judgment of the Eleventh Circuit Court of Appeals affirming summary judgment for Respondent Asplundh Tree Expert Company in the appeal by Petitioner Anthony Montague was entered on October 1, 2003. The Eleventh Circuit denied Montague's Petition for Rehearing and Petition for Rehearing En Banc on December 11, 2003. Montague filed the Petition for a Writ of Certiorari on January 27, 2004, seeking to invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1).

STATUTES INVOLVED IN THE CASE

42 U.S.C. § 1981:

(a) Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined

For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

42 U.S.C. § 2000e-2(a) Employer Practices

It shall be an unlawful employment practice for an employer –

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of

employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-(3)(a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

INTRODUCTION

Petitioner Anthony Montague ("Montague") worked for Asplundh Tree Expert Co. ("Asplundh") as a Coordinator until his employment was terminated for insubordination after he engaged in a physical altercation with his supervisor. On February 28, 2002, Montague filed a complaint in the United States District Court for the Northern District of Alabama under Title VII of the Civil Rights Act of 1964, as amended, and 42 U.S.C. § 1981 alleging that Asplundh terminated his employment based on his race and his complaints of alleged discrimination.

In the litigation, Montague did not uncover any evidence to support his theory that Asplundh fired him based on his race or in retaliation for his complaints of alleged discrimination. To the contrary, the evidence showed that Asplundh fired Montague for insubordination when he engaged in an altercation with his supervisor. The evidence further showed that Asplundh fired a white employee who engaged in the same conduct.

Under these facts, the District Court properly dismissed Montague's claims, and the Eleventh Circuit properly affirmed the dismissal. Montague argues that the Eleventh Circuit erred because it did not follow this Court's decisions establishing the applicable summary judgment standard. Contrary to Montague's assertion, the Eleventh Circuit followed this Court's well-established precedent setting forth the applicable summary judgment standard. Montague also argues that this Court's decision in *Desert Palace, Inc. v. Costa*, 123 S. Ct. 2148 (2003), eviscerated over 30 years of employment discrimination law and that the Eleventh Circuit refused to use this newly-created format for analyzing his claims. However,

this Court has made clear in at least one case after *Desert Palace* that the long-followed and well-established burden-shifting analysis of employment discrimination claims remains the law. As such, the Eleventh Circuit properly applied the correct standard and this Court should deny Petitioner Montague's request for review of the lower courts' rulings.

COUNTERSTATEMENT OF THE CASE[2]

A. Background on Asplundh

Asplundh provides a variety of services to the electrical utility industry, primarily clearing trees, brush, and undergrowth from electrical power lines (Doc. 39) (Miller Aff. ¶ 1).[3] Asplundh's services are provided through crews consisting of two to six workers, and supervised by a Crew Foreman (*Id.*). The Crew Foreman reports to a General Foreman, and the General Foreman reports to a Supervisor (Doc. 39) (Pl. Depo. p. 40; Rice Depo. p. 14). Asplundh sometimes employs an intermediate-level supervisor, called a Coordinator, ranked between a General Foreman and a Crew Foreman (Doc. 39) (Miller Aff. ¶ 1). Coordinators supervise several crews, help with payroll and invoices, order materials, and complete time sheets (Doc. 39)

[2] The Statement of Facts set forth in Montague's Petition does not contain the relevant facts considered by the lower courts. Asplundh also objects to the liberty Montague has taken with the facts and the inferences he has included in the facts. In response, Asplundh provides this Counterstatement.

[3] The citations contained in this Counterstatement of the Case are to the record submitted to the Eleventh Circuit.

(Pl. Depo. pp. 44-45). Currently in Asplundh's Huntsville division, Randy Parham (WM) is the Supervisor; Troy Rice (WM) is the General Foreman; and Marty Rowell (WM) and Al Gilbert (BM) are the Coordinators (Doc. 39) (Miller Aff. ¶ 1).

B. Company Policies

Asplundh maintains an equal employment opportunity policy, as well as a discipline and discharge policy (Doc. 39) (Pl. Depo. p. 29; Exh. 3 to Pl. Depo.). Insubordination is specifically identified in both Asplundh's disciplinary policy and regional policy manual as a dischargeable offense (Doc. 39) (Pl. Depo. p. 29; Exh. 3 to Pl. Depo.; Miller Aff. ¶ 4; Exh. A to Miller Aff.).

C. Montague's Employment

In May of 1991, Montague was hired to work as a crew member (Doc. 39) (Pl. Depo. pp. 27, 31; Exh. 2 to Pl. Depo.). Montague received several promotions during his employment and in 1997, he was promoted to a newly-created Coordinator job (Doc. 39) (Pl. Depo. pp. 35, 38, 45, 70). Two years after Montague's promotion, Asplundh lost business with one of its customers, Huntsville Utilities, and as a result, Montague was moved back to a Crew Foreman job, a demotion that Montague does not allege was motivated by his race (Doc. 39) (Pl. Depo. pp. 47-48; Rice Aff. ¶ 1).

After Asplundh regained some of its lost business, Montague was again promoted to the job of Coordinator, in part on the recommendation by General Foreman Troy Rice (Doc. 39) (Pl. Depo. p. 50; Rice Depo. pp. 21-22; Rice Aff. ¶ 2). As Coordinator, Montague worked with another

Asplundh Coordinator, Marty Rowell (WM), as well as Huntsville Utilities' employees Jeff Jordan (WM), Melvin Whitman (BM), and Charlie Davis (BM), who were supervisory employees for Huntsville Utilities (Doc. 39) (Pl. Depo. pp. 53-54). Generally, Huntsville Utilities assigned work to Asplundh, and the Asplundh Coordinators would ensure that the jobs were performed correctly (Doc. 39) (Pl. Depo. p. 55).

D. Montague's Opposition Activities

In 1997, Montague complained about his General Foreman's treatment of black employees (Doc. 39) (Pl. Depo. pp. 67-68). After Montague's complaint, the General Foreman's employment was terminated (*Id.*). Further, Montague claims that throughout his employment with Asplundh he often voiced opposition to racially-offensive behavior and to what he perceived as harassment and discrimination in the workplace (Doc. 39) (Pl. Depo. pp. 37, 60-61, 74-75).

E. Opening For General Foreman

Asplundh had an opening for a General Foreman in Atlanta, Georgia, in April of 2001 (Doc. 39) (Miller Aff. at ¶ 2). All Asplundh employees who were eligible to be a General Foreman and were willing to relocate were sent personal history questionnaires (Doc. 39) (Miller Depo. at 48-49). Because Montague's June 2000 Foreman Evaluation Worksheet indicated that he was ready for a promotion and that he was willing to relocate, Montague was sent a personal history questionnaire (Doc. 39) (Miller Depo. at 48-50 & Exh. 4). Then, on or about Thursday, April 5, 2001, Rice talked with Montague about the

General Foreman job in Atlanta[4] (Doc. 39) (Pl. Depo. at 199). Montague said that he was not interested in moving to Atlanta, and Rice encouraged him to at least consider interviewing for the job (Doc. 39) (Pl. Depo. at 197-200). However, Montague was not interested and did not agree to interview[5] (Doc. 39) (Pl. Depo. at 199-200).

F. Events Leading To The Termination Of Montague's Employment

1. Rumors of Sexual Harassment

On Friday, April 6, 2001, Montague confronted fellow Asplundh Coordinator Marty Rowell about a rumor he had heard to the effect that Rowell and Rice, as well as Huntsville Utilities Supervisor Jeff Jordan, were trying to persuade Amanda Brown, an Asplundh Crew Foreman, to accuse Melvin Whitman (Coordinator for Huntsville Utilities) of sexual harassment (Doc. 39) (Pl. Depo. pp. 104-105; Rowell Depo. pp. 12-13). Rowell denied that there was any truth to this rumor (Doc. 39) (Pl. Depo. p. 105; Rowell Depo. pp. 12-13).

The following Monday morning (April 9, 2001) Rowell related Montague's accusation to Asplundh manager Rice and Huntsville Utilities manager Jordan (Doc. 39) (Rowell Depo. pp. 14-15; Rice Depo. pp. 27-28). Jordan called a meeting later that same morning at Huntsville Utilities to

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[4] Rowell was also offered an interview, but he refused because he did not want to relocate (Doc. 39) (Rowell Depo. at 32).

[5] While Montague claims that he was told the job was his if he wanted it, he was never actually offered the job. (Doc. 39) (Pl. Depo. at 197-201).

discuss the situation (Doc. 39) (Rowell Depo. p. 15; Rice Depo. pp. 28-29). Jordan and Whitman attended the meeting for Huntsville Utilities, and Rice, Rowell, and Montague attended the meeting for Asplundh (Doc. 39) (Pl. Depo. p. 107; Rice Depo. p. 30; Rowell Depo. p. 15).

When the meeting started, Jordan and Rice explained that statements were being made that they, along with Marty Rowell, were trying to persuade Amanda Brown to accuse Melvin Whitman of sexual harassment (Doc. 39) (Pl. Depo. pp. 109-110; Rice Depo. p. 36). Jordan and Rice denied that they or Rowell had ever taken such actions (Doc. 39) (*Id.*). Whitman responded by saying that he did not believe Jordan and Rice, in part because Whitman believed that Rowell and his crew were taking notes regarding what transpired at the work sites in an effort to gather evidence against Whitman (Doc. 39) (Pl. Depo. pp. 110-112; Rice Depo. p. 36). Montague then voiced his opinion, stating:

> If you're going to tell your crew to do this and do this, that's going to make Melvin think that you're being sneaky and underhanded behind his back. And I said, Melvin, if you go to the crew that's going to make Marty think that you're being sneaky and underhanded. I said, y'all just need to come together like men and just talk and you wouldn't have this problem . . .

(Doc. 39) (Pl. Depo. p. 113). Jordan then afforded each person the opportunity to discuss any other issues, and when each person declined to do so, Jordan adjourned the meeting (Doc. 39) (Pl. Depo. p. 115).

2. Montague's Insubordination

After the meeting, Rice asked to meet with Rowell and Montague in the parking lot at Huntsville Utilities because he was upset that they were "not together as a team" and that Montague "had turned" on Rowell[6] (Doc. 39) (Pl. Depo. pp. 118-119; Rowell Depo. p. 20; Rice Depo. p. 40). Rice told Montague that he worked for Asplundh and that he needed to act like an Asplundh employee (Doc. 39) (Pl. Depo. p. 119; Rice Depo. pp. 40, 65; Exh. 1 to Rice Depo.). Montague interrupted him, stating that he had not done anything wrong at the meeting (Doc. 39) (Pl. Depo. p. 119; Rice Depo. pp. 40, 65; Exh. 1 to Rice Depo.). Additionally, Montague stated:

> you know, another thing, you ain't – you can't just talk to me any kind of way because I am thirty-one years old and I don't talk to my kids like that and you're not going to talk to me like that. And I said, you or anybody else in this company ain't going to dictate what I say or cannot say . . .

(Doc. 39) (Pl. Depo. p. 120). At that point, because Montague appeared to be too upset to work, Rice suspended

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[6] Montague cited to Melvin Whitman's Declaration for evidence that Rice's objection to Montague's conduct was not reasonable. However, Whitman was not an Asplundh employee and is not competent to testify or opine on how Asplundh should enforce its work rules or whether Montague's conduct met Asplundh's expectations. Further, Mr. Whitman was not a decision-maker and was not involved in the decision to discharge Montague. Asplundh filed a Motion to Strike the Declaration of Melvin Whitman, which the District Court ruled as moot when granting Asplundh's Motion for Summary Judgment.

Montague for the remainder of the day (Doc. 39) (Pl. Depo. p. 120; Rice Depo. pp. 42, 65; Exh. 1 to Rice Depo.).

Montague claims that as he entered his truck to leave, Rice shouted to Rowell that he had done all he could for Montague (Doc. 39) (Pl. Depo. pp. 122-123; Rice Depo. pp. 42-43, 65; Exh. 1 to Rice Depo.; Rowell Depo. p. 21). In response, Montague exited the truck and resumed his argument with Rice, telling Rice "you ain't done nothing for me" (Doc. 39) (Pl. Depo. p. 122). Rice reminded Montague that he was suspended and told Montague to give him the keys to Montague's Company truck (Doc. 39) (Pl. Depo. pp. 122-123; Rice Depo. pp. 42-43, 65; Exh. 1 to Rice Depo.; Rowell Depo. pp. 21-22). Montague took his Company truck key off his key ring and "pitched" it to Rice, hitting him in the chest (Doc. 39) (*Id.*). Then, Rice told Montague that he needed to "quiet down," and Montague responded with a threat that he would "get" Rice and the Company (Doc. 39) (Pl. Depo. pp. 123-124; Rice Depo. pp. 65, 67-68; Exh. 1 to Rice Depo.; Rowell Depo. p. 22). Montague then demanded that Rice drive him home because he no longer had transportation (Doc. 39) (Pl. Depo. p. 124).

During the trip to Montague's residence, Rice and Montague "yelled and screamed all the way to the house" (Doc. 39) (Pl. Depo. pp. 124-125). Montague told Rice "you can't keep yelling at me, you need to stop, I'm the supervisor, I'm a man" (Doc. 39) (Pl. Depo. p. 124). Along the way, Montague realized that he had left his house key in the Company truck, so the two returned to Huntsville Utilities to retrieve Montague's house key (Doc. 39) (Pl. Depo. p. 133). At that point, Rice allowed Montague to use the Company truck to drive home and told Montague that they would talk the following day (Doc. 39) (Pl. Depo. p. 129; Rice Depo. p. 52).

3. The Decision To Terminate Montague's Employment

After Rice took Montague to the truck, he reported these events to his Supervisor, Randy Parham (Doc. 39) (Rice Depo. pp. 53-54). Parham told Rice to telephone Kerry Miller, Asplundh's Compliance and Equipment Supervisor, who was responsible for Human Resources in Region 52 (Doc. 39) (Miller Depo. pp. 7, 11, 60; Rice Depo. p. 54). Rice called Miller and explained the incident[7] (Doc. 39) (Rice Depo. pp. 55, 65, 70; Exh. 1 to Rice Depo.; Miller Depo. p. 45). That same day, Miller met with Parham to discuss the April 9, 2001 meeting at Huntsville Utilities, and the events in the parking lot after the meeting (Doc. 39) (Miller Depo. p. 46). Miller also talked with Asplundh's General Counsel about the situation (Doc. 39) (Miller Depo. p. 54).

Based on the information he learned, Miller determined that Montague's statements during the meeting at Huntsville Utilities and his later behavior toward Rice in the parking lot constituted insubordination (Doc. 39) (Miller Depo. pp. 39-43). Asplundh's employee handbook provides that insubordination is a terminable offense (Doc. 39) (Miller Depo. p. 50). After making the decision to terminate Montague's employment,[8] Miller called Rice and instructed him to terminate Montague's employment,

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[7] At some unspecified point in time, Rice faxed Miller statements from himself, Rowell and Brown, detailing the incident (Doc. 39) (Miller Depo. pp. 30-33, 45; Exhs. 1-3 to Miller Depo.).

[8] Miller had discharged other employees (Doc. 39) (Miller Depo. pp. 7, 11, 60; Rice Depo. p. 54).

effective April 12, 2001[9] (Doc. 39) (Miller Depo. pp. 52-53; Rice Depo. p. 56; Pl. Depo. pp. 136-138; Exh. 6 to Pl. Depo).

Montague knows of no white employees who were disciplined for insubordination and were not fired (Doc. 39) (Pl. Depo. p. 139). In fact, any Asplundh Coordinator or Asplundh employee who has been insubordinate to a General Foreman has been discharged (Doc. 39) (Miller Aff. ¶ 3; Rice Aff. at ¶ 7). David Bridges, white Crew Foreman, was discharged for insubordination in January 2001 because he cursed at Rice, threatened Rice, and threw keys at Rice (Doc. 39) (Rice Aff. ¶ 8; Exh. B to Rice Aff.).

G. Montague's Request For Rehire

On May 3, 2001, Montague submitted a letter to Asplundh's EEO Officer requesting that he be rehired (Doc. 39) (Pl. Depo. p. 142; Exh. 7 to Pl. Depo). However, Asplundh denied Montague's request for rehire on May 22, 2001, because employees terminated for insubordination are not eligible for rehire (Doc. 39) (Pl. Depo. pp. 142, 156-157; Exhs. 7, 9, and 10 to Pl. Depo.).

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[9] Montague has also pointed out that in response to a discovery request, Asplundh indicated that Troy Rice, Kerry Miller, and Randy Parham made the decision to terminate Montague's employment. This response is not in conflict with other testimony because the evidence is clear that Rice talked with Miller after the incident and that Miller talked with Parham after the incident (Doc. 39) (Miller Depo. at 45-46; Rice Depo. at 55, 65, 70 and Exh. 1). Then, because Miller was responsible for Human Resources in Region 52, the ultimate decision to terminate Montague's employment rested with him (Doc. 39) (Miller Depo. at 11, 39-40).

REASONS FOR DENYING WRIT

I. Montague Presents No Basis for This Court's Review

This Court's rules identify examples of the limited cases this Court considers for review and mandate that a "petition for writ of certiorari will be granted only for compelling reasons." Sup. Ct. R. 10. Further, the rules provide that "[a] petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10. Despite the clarity of this Court's rules, Montague never acknowledges or addresses the considerations governing review on certiorari. Montague simply restates his unsuccessful arguments to the Eleventh Circuit and seeks this Court's review of a case that represents the application of well-settled employment discrimination law and presents no issues of general importance. The District Court's entry of summary judgment and the Eleventh Circuit's affirmance were proper application of well-settled law and mandate that the Petition be denied.

In addition to this Court's rules governing certiorari, this Court has explained that certiorari is granted only where the case raises "questions of importance not heretofore considered by this Court and over which the circuits are divided." *Lehman v. Lycoming County Children's Serv.*, 458 U.S. 502, 507 (1982). Montague's case does not raise such a question. Nor does Montague's case present a question of public importance "in the context of meaningful litigation." *Monrosa v. Carbon Black, Inc.*, 359 U.S. 180, 184 (1959). Montague's failure to even address this Court's considerations for review dictates that the Petition be denied.

II. Montague and Thomas Do Not Involve Identical or Closely Related Questions

Montague seeks review of his case, along with the unrelated case *Corey Thomas v. Wal-Mart Stores, Inc.*, (unpublished) (11th Cir., October 30, 2003). Pursuant to Supreme Court Rule 12, a single petition for a writ of certiorari covering all the judgments suffices when the two cases "involve identical or closely related questions." Sup. Ct. R. 12. However, the two cases before the Court in this petition do not involve identical or even closely related questions. In addition to the diverse factual backgrounds present in both cases, the two Eleventh Circuit decisions involved different stages of the burden-shifting analysis present in employment discrimination cases. For example, in *Thomas*, the Eleventh Circuit held that the plaintiff Thomas failed to establish a *prima facie* case of discrimination. The *Thomas* decision hinges upon the plaintiff's failure to meet this first step in the burden-shifting analysis. In contrast, the Eleventh Circuit in *Montague* found that the plaintiff Montague had established a *prima facie* case of discrimination and retaliation and focused its analysis on Montague's failure to demonstrate pretext. The differences between the two cases render the two impractical for simultaneous review by this Court. Because the *Montague* and *Thomas* cases do not involve identical or closely related questions, the two cases were improperly joined in the petition before this Court for review. As such, the petition fails to comply with this Court's rules for granting certiorari and for bringing a single petition and this Court should deny the writ.

III. The Eleventh Circuit Properly Applied the Summary Judgment Standard

Although it does not constitute a proper question for this Court's review, Montague attempts to create an issue for review by mischaracterizing the Eleventh Circuit's ruling on the question of pretext. In Montague's Writ, he asserts that the Eleventh Circuit departed from the jurisprudence of this Court and other circuits in its finding that Montague did not show pretext in Asplundh's decision to terminate his employment for insubordination. However, the Eleventh Circuit did no such thing. In contrast to Montague's mischaracterization, the Eleventh Circuit properly followed over 30 years of precedent by requiring Montague to present evidence of pretext in Asplundh's legitimate, nondiscriminatory reason for terminating his employment to survive the motion for summary judgment.

In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), this Court explained the now familiar burden-shifting analysis used in employment discrimination cases. Specifically, this Court addressed an employee's burden once an employer presents a legitimate, nondiscriminatory reason for an employment decision: the burden shifts to the employee to show pretext in that reason. The Court further explained that "[e]specially relevant to such a showing would be evidence that white employees involved in acts against petitioner of comparable seriousness to the [improper conduct] were nevertheless retained or rehired." *McDonnell Douglas*, 411 U.S. at 804. Providing further clarification, this Court held in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 134 (2000), that a plaintiff's *prima facie* case of discrimination combined with sufficient evidence for a reasonable factfinder to reject the employer's legitimate,

nondiscriminatory explanation for its decision may be adequate to sustain a finding of liability for discrimination.

In this case, the Eleventh Circuit concluded Montague had satisfied the burden of production for a *prima facie* case of discrimination and that Asplundh had a presented a legitimate, nondiscriminatory reason for terminating plaintiff's employment. (Pet. App. 37). However, the Eleventh Circuit determined that Montague had not presented sufficient evidence to reject Asplundh's legitimate, nondiscriminatory reason for terminating his employment. In essence, the Eleventh Circuit found Montague's evidence of pretext lacking.[10] Thereafter, as an example, the Eleventh Circuit explained how Montague could have used a similarly situated comparator to show pretext. The Eleventh Circuit went on to note however that Asplundh treated the only similarly situated comparator the same as it treated Montague. Therefore, the Eleventh Circuit followed this Court's precedent and reached the proper conclusion that Montague did not produce evidence sufficient to show pretext.[11]

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[10] Montague cites *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993) as support for his claim that inaccurate testimony about the termination decision allows a reasonable jury to infer the articulated reason is pretext. However, Montague has not shown inaccurate testimony about the discharge decision, and this Court in *Hicks* did not find that inaccurate testimony about an employment decision shows pretext, evidence of discrimination, or requires the denial of a Motion for Summary Judgment.

[11] In affirming the summary judgment in favor of Asplundh on Montague's retaliation claim, the Eleventh Circuit again found that Montague could not show pretext in Asplundh's legitimate, nonretaliatory reason for terminating his employment.

Montague's disagreement with the finding by the Eleventh Circuit that he could not prove pretext in Asplundh's decision to terminate his employment does not create an issue for review by this Court. Therefore, Montague's Petition is due to be denied.

IV. *Desert Palace* Does Not Eviscerate *McDonnell Douglas*

Faced with the garden variety employment discrimination case, the application of the *McDonnell Douglas* framework, and the improbability of review, Montague attempts to characterize this as a mixed-motive case and create an issue for review based on this Court's decision in *Desert Palace, Inc. v. Costa*, 123 S. Ct. 2148 (2003). While Asplundh included the mixed motive defense as a possible alternative defense in its Answer, Asplundh, in pleading this defense, specifically denied that race or Montague's complaints of alleged discrimination were factors in the decision to terminate his employment. Further, Asplundh's summary judgment motion and brief made no reference to the mixed motive defense and in fact, denied there was any evidence of discrimination or retaliation. Asplundh's preservation of a possible mixed motive defense in its Answer does not transform a single motive case into a mixed motive case. In fact, Montague did not assert any such argument at the district court level or in his initial appeal brief before the Eleventh Circuit. Again, it is only in the face of improbable review by this Court that Montague attempts to transform this straightforward single motive disparate treatment case into a mixed motive case. Notably, Montague failed to present a mixed motive case because he failed to establish, even viewing the facts in the light most favorable to him, that his race or complaints

of alleged discrimination were motivating factors in the decision to terminate his employment.

Not only does Montague attempt to transform this single motive case into a mixed motive case, Montague misapplies the holding in *Desert Palace*. In *Desert Palace*, this Court answered the question of whether a plaintiff must present direct evidence of discrimination to obtain a mixed motive jury instruction in a Title VII case. *Desert Palace*, 123 S. Ct. at 2150. In Montague's Writ, he assumes that *Desert Palace* applies in the instant case and that the *Desert Palace* decision erased over 30 years of case law involving employment discrimination by negating the use of the burden-shifting announced in *McDonnell Douglas*. To abandon *McDonnell Douglas* would cause great upheaval in employment discrimination cases. Clearly, if this Court had intended to revolutionize employment discrimination law by overruling over 30 years and countless cases explaining and analyzing such claims pursuant to the *McDonnell Douglas* burden-shifting standard, this Court would have, at the very least, mentioned or cited *McDonnell Douglas* in the *Desert Palace* opinion. The *McDonnell Douglas* case, however, was not mentioned in the *Desert Palace* opinion, demonstrating that the two are inapposite.

More importantly, in a post-*Desert Palace* decision, this Court reaffirmed the use of the *McDonnell Douglas* burden-shifting standard in a disparate treatment case brought under the Americans with Disabilities Act. In *Raytheon*, this Court explained:

> The Court in *McDonnell Douglas* set forth a burden-shifting scheme for discriminatory-treatment cases. Under *McDonnell Douglas*, a plaintiff must first establish a *prima facie* case of discrimination.

> The burden then shifts to the employer to articulate a legitimate, nondiscriminatory reason for its employment action. 411 U.S., at 802, 93 S.Ct. 1817. If the employer meets this burden, the presumption of intentional discrimination disappears, but the plaintiff can still prove disparate treatment by, for instance, offering evidence demonstrating that the employer's explanation is pretextual. See *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 143, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000). **The Courts of Appeals have consistently utilized this burden-shifting approach when reviewing motions for summary judgment in disparate-treatment cases.**

Raytheon Company v. Hernandez, 124 S. Ct. 513, 517 n.3 (2003) (emphasis added). As explained by this Court in *Raytheon*, the *McDonnell Douglas* burden-shifting analysis has been consistently applied in disparate treatment cases, like the one in the instant case. The Eleventh Circuit followed this consistent utilization when analyzing Montague's case under *McDonnell Douglas*. *Desert Palace* did not eviscerate *McDonnell Douglas* and Montague's attempts to transform this case into anything other than the garden-variety employment discrimination case fail. As such, the Petition presents no basis for review and should be denied.

CONCLUSION

Based on the foregoing, Montague's case presents no issue that merits this Court's attention or review, and the Petition should be denied.

Respectfully submitted,

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